SUPREME COURT, U. S.
FEB 3
MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974
No. 74-961

PHOEBE WILSON DILLON, Petitioner,

-vs-

ANTLER LAND COMPANY of Wyola, a Montana Corporation; LITTLE HORN LAND COMPANY, a Montana Corporation, ANTLER LAND COMPANY, a Montana Corporation, LITTLE HORN LAND AND LIVESTOCK COMPANY, a Montana Corporation; UNION BANK AND TRUST COMPANY, Executor of the Estate of BERTHA TSCHIRGI; REX HIBBS, Executor of the Estate of F. M. TSCHIRGI; FRANCIS J. MURTHA, as Trustee for TRUSTEES OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREA PENSION FUND; and the UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

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No. _____

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v.

ANTLER LAND COMPANY of Wyola, a Montana Corporation; LITTLE HORN LAND COMPANY, a Montana Corporation; ANTLER LAND COMPANY, a Montana Corporation; LITTLE HORN LAND AND LIVESTOCK COMPANY, a Montana Corporation; UNION BANK AND TRUST COMPANY, Executor of the Estate of BERTHA TSCHIRGI; REX HIBBS, Executor of the Estate of F.M. TSCHIRGI; FRANCIS J. MURTHA, as Trustee for TRUSTEES OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREA PENSION FUND; and the UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, PHOEBE WILSON DILLON, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case November 6, 1974.

OPINIONS BELOW

The opinion for the Court of Appeals for the Ninth Circuit affirming the Summary Judgment rendered by the United States District Court for the District of Montana, Billings Division, has not yet been reported and is set forth in the Appendix, infra, at pp. 1a - 15a. The opinion of the United States District Court for the District of Montana, Billings Division, is reported at 341 F. Supp. 734 (D.C. Mont. 1972) and is set out in the Appendix, infra, pp. 1b - 2c.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 6, 1974. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Crow Indians are barred by Montana statutes of limitation and laws of adverse possession from recovering their allotted fee lands conveyed to White Men contrary to the prohibition of Section 2, Act of June 4, 1920?

2. Whether a White Man can abort the trusteeship of the United States government over allotted Indian lands by fraudulently inducing the allottee to procure

issuance of a fee patent?

3. Whether the lower courts were correct in ruling that the United States government has no mandatory duty to litigate title to Indian Lands procured by White Men contrary to law and express Congressional prohibition?

UNCODIFIED ACTS, RULES AND STATUTORY PROVISIONS INVOLVED

Act of June 4, 1920, Sec. 2 (41 Stat. 695):

The pertinent provisions of Section 2 of the Act of June 4, 1920 appear in Appendix D at p. 1d.

Rule 12(b), Fed. R. Civ. P.:

The relevant portion of Rule 12 (b), Fed. R. Civ. P. appears in Appendix D at p. 2d.

United States Code, Title 25, Sections 185, 348 and 349:

Applicable provisions of the above Sections of the United States Code, Title 25, appear in Appendix D at pp. 2d - 4d.

STATEMENT OF CASE

This is an action brought by a competent Crow Indian pursuant to 28 USC § 1331 to recover lands allotted and patented to her in fee pursuant to the Crow Indian Allotment Act of June 4, 1920 (41 Stat. 695). The suit is a test case brought to determine whether the Crow Indians are barred by the laws of the State of Montana from recovering allotted fee lands unlawfully conveyed to the White Man, as well as the actionability of the United States , under the Federal Tort Claims Act, 28 USC § 1346(b), for it's failure to take steps necessary to set these conveyances aside. The facts, for the most part recited in the opinions below, are essentially undisputed.

In 1923 and 1924, Petitioner Phoebe Wilson Dillon, then a minor, was allotted trust patents to 1,040 acres of grazing land on the Crow Indian Reservation in the State of Montana. Upon receiving her certificate of competency in 1949 at age 34, Petitioner undertook management of her own affairs and leased her land to Matt Tschirgi, alter ego of ANTLER LAND COMPANY, one of the Defendants herein.

In 1955, Petitioner, desparately in need of money to cover her husband's medical bills, approached Tschirgi for an advancement on the rent, which he refused, except on condition that she apply for a fee patent on her land. When Petitioner

finally agreed, Tschirgi gave her $100, told her how to prepare the application and instructed her to falsely state that no one had imposed on her to apply for a patent in fee.

Petitioner's application for a fee patent was made on February 25, 1955. Prior to its issuance, however, on May 21, 1955, Petitioner entered into a written contract to sell the land for $7.00/acre to Tschirgi's corporation, Defendant ANTLER LAND COMPANY, once she obtained the patent. At the time of execution, Tschirgi paid her an additional $300 and promised, furthermore, that notwithstanding the written contract, he would pay Petitioner whatever figure the land was appraised at.

On October 3, 1955, a fee patent, issued September 19, 1955, was delivered to Petitioner. Three days later, on October 6, she executed and delivered a warranty deed to ANTLER LAND COMPANY.

All total, Petitioner received $3,711.00 in cash for her land which the Superintendent's office at Crow Indian Agency appraised at $10 per acre or $10,400.00. Upon discovery of the appraised value, Petitioner sought the difference from Matt Tschirgi without avail, he contending that she was bound by the May 21st contract.

Since delivering the deed to ANTLER LAND COMPANY in 1955, Petitioner has diligently sought assistance from numerous government

officials in the Bureau of Indian Affairs and Department of Justice in an attempt to have it set aside. The record discloses that on April 25 and September 11, 1963 and again on January 4, 1964, various government officers either suggested or recommended, that the United States should commence action to quiet the title in trust for Plaintiff. /Record at 90-94, 365/. Petitioner learned that the Department of Justice decided to drop her case on June 12, 1970. The instant action was subsequently filed by private counsel on July 20, 1970.

The Complaint states two claims for relief. By the first claim, Petitioner seeks to quiet title to the land in herself or United States, as her trustee, and to recover rents and profits. In support of this claim, three theories, all stemming from Petitioner's status as an Indian, are urged: first, that there was fraud which vitiated the patent from the United States to Plaintiff and the subsequent deed from her to ANTLER LAND COMPANY; second, that while the land was in trust status Plaintiff executed a contract to convey it which, under the provisions of the General Allotment Act (25 USC §348), made the subsequent deed invalid; and third, that ANTLER LAND COMPANY on the date of the delivery of the deed owned lands in excess of the acreage limitations contained in Section 2 of the Crow Indian Allotment Act of June 4, 1920 (41 Stat. 695) thereby rendering the deed null and void.

By her second claim, Petitioner seeks to recover $33,000.00 in damages from the United States pursuant to the Federal Tort Claims Act (26 USC §§ 2671-2680) It is Petitioner's contention here that failure of the Department of Justice to take action on her behalf to set aside the deed given ANTLER LAND COMPANY was in breach of a mandatory duty enjoined upon the United States by 25 USC § 185.

On motions for summary judgment directed to the first claim, the District Court held that the October 6, 1955 deed was voidable on the first and second theories advanced, and void under Section 2 of the Crow Act of 1920. It further held, however, that recovery on all theories was barred by the Montana Statutes of Limitation and that Respondents have acquired title by adverse possession against the Petitioner.

Although no motion to dismiss was properly interposed on Petitioner's second claim for relief, (See Rule 12(b), infra, Appendix D at p. 2d.) the lower court granted summary judgment in favor of the United States on It's Answer sua sponte holding that 25 USC § 185 imposes no mandatory duty upon the United States "to litigate the cases arising out of the dealings of emancipated Indians with fee lands and, second, because in any event the duties assumed could never be anything but a discretionary duty to which the Federal Tort Claims Act does not apply." /Record at 574/.

On November 6, 1974, the Ninth Circuit Court of Appeals affirmed the District Court's ruling on virtually identical grounds.

REASONS FOR GRANTING THE WRIT

I.

THE NINTH CIRCUIT'S DECISION THAT STATE STATUTES OF LIMITATION CAN BE INVOKED TO GIVE VITALITY TO A VOID DEED AND TO BAR THE RIGHTS OF INDIANS IN THEIR RESTRICTED FEE LANDS IS WHOLLY UNPRECIDENTED

By the Crow Indian Allotment Act of June 4, 1920 (41 Stat. 695), as amended by the Act of May 26, 1926 (44 Stat. 658), Congress undertook allotment of Crow Reservation lands among members of the Crow Tribe. Section 1 of the Act provides for allotments in severalty to be evidenced by "patents in fee to competent Indians ... but by trust patent to minors and incompetent Indians, the force and legal effect of the trust patents to be as prescribed by the General Allotment Act of February 8, 1887 (Twenty-fourth Statutes, p. 388)," now 25 USC §§348 and 349 (infra, Appendix D at pp. 3d - 4d).

Section 348 essentially provides that the United States is to hold legal title

to the allotted lands "in trust" and continue to exercise its exclusive guardianship duties over the allottee and his lands for a period of twenty-five years. In the Matter of Heff, 197 US 488 (1904); United States v. Pelican, 232 US 442 (1913); Minnesota v. United States, 305 US 382 (1939). Section 349 further provides that at the expiration of the twenty-five year period, or sooner if the Secretary of the Interior determines that a given allottee is "competent and capable of managing his own affairs," a fee patent is to issue whereupon "... each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, under the state in which they reside."

Decisions of this Court have interpreted the language of Section 349 as meaning that the issuance of an unrestricted fee patent discharges the allottee and his land from federal guardianship status rendering him and his fee land subject to state laws. Dickson v. Luck Land Co., 242 US 371 (1917); United States v. Waller, 243 US 452 (1917); Larkin v. Paugh, 276 US 431 (1928). Because petitioner had applied for and received a fee patent to the lands she seeks to quiet title to here, both the District Court and the Court of Appeals were of the opinion that Section 349 and the above-decisions of this Court compel applying the five-year Montana Statute of Limitations for adverse possession to bar her requested relief.

Both courts failed to appreciate however, that because of Section 2 of the Crow Allotment Act of June 4, 1920, Crow lands, although patented in fee, are not unrestricted. Section 2 prohibits and declares void any conveyance of trust or fee patent land by a Crow Indian, whether directly or indirectly, to any person, company or corporation who owns more than 1,280 acres of grazing land, or who by such conveyance would become the owner of more than 1,920 acres of grazing land, within the boundaries of the Crow Indian Reservation. (See, infra, Appendix D at p. 1d). By amendment in 1940 only non-Indians are now prohibited from exceeding the acreage restrictions. Act of February 29, 1940 (54 Stat. 252).

Apparently, neither of the lower courts considered Section 2 as a restriction on the Indian's freedom to alienate fee patent lands. As the District Judge declared:

> In my opinion the effect of Section 2 of the Crow Act was to limit the power of a buyer to buy. The Indian was not forbidden to sell; /Record at 566/.

Nevertheless, the 1920 House and Senate Conference Report which accompanied enactment of Section 2 expressly declares that the law imposes a "limit ... /on/ the number of acres of land that any Crow Indian may sell...." Hearings on S. 2890, 66 Cong. 2d Sess. (1920).

Significantly, in Ewert v. Bluejacket, 259 US 129 (1922), this Court held that an action maintained by individual Indians to set aside a conveyance made in violation of a similar statutory prohibition against sale of Indian lands to non-Indians was not barred by laches or analogous state statutes of limitation. There, a Quapaw Indian conveyed Indian lands to a non-Indian, Ewert, employed as a Special Assistant to the United States Attorney General in Indian affairs. Seven years later, the grantor's heirs sought to cancel the conveyance on the grounds that it was illegal under a federal statute for the grantee to purchase Indian lands. Both the District Court and Eighth Circuit Court of Appeals held, however, that the action was barred by laches.

In reversing, this Court held:

> The purchase by Ewert being prohibited by the statute, was void. Weskey v. Hammer, supra /223 US 85/. He still holds the legal title to the land and the equitable doctrine of laches, developed and designed to protect good faith transactions against those who have slept on their rights, with knowledge and ample opportunity to assert the, cannot properly have application to give vitality to a void deed and to bar the rights of Indian wards

> in lands subject to statutory restrictions. /citing cases/ 259 U.S. at 137-138 (emphasis supplied).

Moreover, two circuit courts, the Seventh and the Tenth, have also refused to apply state statutes of limitation to bar actions brought to recover restricted fee land. United States v. Schwarz, 460 F2d 1365 (7th Cir 1972); Garcia v. United States, 43 F2d 873 (10th Cir 1930). In Schwarz, the Seventh Circuit held that Wisconsin's ten and twenty year adverse possession statutes did not bar an action brought to quiet title on lands the fee patent to which contained a restriction against all alienation without consent of the President. In so ruling the Court declared:

> It has long been held that adverse possession under a state statute of limitation cannot run against Indians, if the land is not alienable by them, so long as such restrictions exist. United States v. 7,405.3 Acres of Land, 4 Cir, 97 F2d 417, 422-423 (1938).
> 460 F2d at 1371.

For similar reasons, the Court in Garcia, supra, held that New Mexico statutes of limitations were inapplicable to suits

maintained by the Puebloes to recover their fee lands since a federal statute, the Act of June 30, 1884, 4 Stat 430 /R.S. §2116/, restricting alienation of the fee carried with it the necessary implication that the lands were still restricted lands over which federal trust responsibilities had not been fully extinquished.

As the Conference Committee Report on S. 2890 reveals, the evident purpose behind enactment of Section 2 was to prevent large farming and ranching corporations from gobbling up land which was intended to help the Crows become self-sufficient. Since its enactment, however, the United States Government has failed to enforce the prohibition. Testimony taken during the mid-1950's in Congressional Hearings held to consider repeal of Section 2, disclosed the then deplorable state of affairs:

> What, then has actually happened? It is evident that, because of the failure of the Secretary of the Interior to enforce the provision of Section 2, the pitfalls which the Conference Committee predicted have actually occurred, both to the public and to the Indians.
>
> As a result of such non-enforcement, and as a further result of the failure of the Secretary of the Interior to disapprove sales of Indian lands when

> in violation of the restrictions of Section 2, one corporation alone has acquired and now owns 134,678 acres of deeded lands formerly allotted to and owned by members of the Crow Tribe. Another corporation has acquired, and now owns 38,459 acres of such lands, another 25,208 acres of such lands and a few other individuals own comparable acreages. Many of these tracts are key tracts of land. By key tracts I mean that such tracts of land control to stock watering and other necessary appurtenances in the respective areas.
>
> If this procedure is allowed to continue, the lands of the Crow Reservation will soon be in the hands of a few overlords, under a system whereby acquisition will continue to be made by sales held under depressed bidding conditions. Testimony of Edward E. Whiteman, Chairman of the Crow Tribal Council, Hearings on S. 332 and H. 2381 and 7255, Before the Special Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 85th Cong. 1st Sess. (1957).

Consequently, if the Crow Indians are to recover their fee lands from large operators such as Antler Land Company, which

held over 40,000 acres of former Crow deeded land in the year 1958, it will be because of private suits such as this. If the Ninth Circuit Court of Appeal's decision is allowed to stand, and the Montana statutes of limitation therefore permitted to perfect conveyances prohibited by the clear language and policy of Section 2, the courts will have effectively accomplished what Congress, in considering repeal of the provision, deliberately refused to do.

II.

CONTRARY TO THE DECISION OF THE APPELLATE COURT, THE EIGHTH CIRCUIT HAS HELD THAT A FEE PATENT PROCURED THROUGH FRAUD DOES NOT EXTINQUISH THE TRUST STATUS OF INDIAN LANDS SO AS TO SUBJECT THEM TO STATE LAW

In United States v. Debell, 227 F. 775 (8th Cir. 1915), the Eighth Circuit held that fraud practiced by a white man to induce a Sioux Indian to apply for a fee patent vitiated the validity of the patent and subsequent deed. In a suit prosecuted by the United States on behalf of the Indian to recover the land from the non-Indian grantee, South Dakota statutes of limitation were found not to bar the action.

Ignored by the Ninth Circuit, moreover, is an opinion of the District Court of Montana, itself, which has intimated that the unlawful issuance of a fee patent does not extinquish the trust status of Indian lands. Gerard v. Mercer, 62 F. Supp. 28 (D.C. Mont. 1945), revs'd on other grounds, sub nom Gerard v. United States, 167 F2d 951 (9th Cir. 1948). In that case, fee patents had been issued without the Indian having made application therefor. Upon issuance of a patent, the State of Montana taxed the lands and subsequently sold them at a tax sale. Twenty five years later, quiet title action was brought to recover the land.

In ruling on a motion to dismiss the Complaint because of the bar of the state statutes of limitations, the Court ruled:

> ... if the proof should show that the lands, or certain tracts thereof, were not lawfully acquired and that the United States is still holding them, as trustee under a restricted patent, then the rule /i.e. statute of limitations/ would not apply; .... 62 F. Supp. at 30.

The Ninth Circuit's ruling that a white man can abort the trusteeship of the United States government over allotted Indian lands by fraudulently inducing the allottee to secure issuance of a fee patent presents a compelling case, therefore,

for this Court to finally settle the important issue of whether or not the trust status of Indian lands can be extinquished by the unlawful issuance of a fee patent.

III.

PRIOR DECISIONS OF THIS COURT ESTABLISH THAT THE UNITED STATES GOVERNMENT HAS AN AFFIRMATIVE DUTY TO LITIGATE TITLE TO INDIAN LANDS WHERE THE VALIDITY OF THE FEE PATENT IS QUESTIONED OR IT APPEARS THAT THE LANDS ARE IN JEOPARDY OF BEING MISAPPROPRIATED

Section 185 of Title 25, United States Code, provides that federal agents "shall take such measures ... as may be necessary to protect ... /the/ Indian in the quiet enjoyment of ... lands ... allotted to him." (infra, Appendix D at p. 2d). The language is mandatory, the government "shall" protect the Indian's enjoyment of his land. Moreover, the statute uses the word "lands" when speaking of the object of the government's duty; it does not single out "trust lands" from "fee lands" for special protection. The fair inference is that the statute is meant to encompass both.

While this section does not, itself, "obligate" the government to "litigate" cases involving title to Indian lands,

decisions of this Court point to at least two cases where such a duty may arise. The first is illustrated by United States v. Beebe, 127 US 338 (1887), where the Court strongly charged the Government with not only the right, but the duty, to institute judicial proceedings on behalf of an Indian to set aside a patent issued him under fraudulent circumstances:

> If a patent is wrongfully issued to one individual, which should have been issued to another, or if two patents for the same land have been issued to two different individuals, it may properly be left to the individuals to settle, by personal litigation, the question of right in which they alone are interested. But if it should come to the knowledge of the Government that a patent has been fraudulently obtained, and that such fraudulent patent, if allowed to stand, would work prejudice to the interests or rights of the United States, or prevent the Government from fulfilling an obligation incurred by it, ... which personal litigation could not remedy, there would be an occasion which would make it the duty of the Government to institue judicial proceedings to vacate such patent. 127 US at 342 (emphasis supplied).

Accord., United States v. Minnesota, 270 US 181 (1925).

The second stems from the Government's trust responsibilities over Indian lands generally. United States v. Creek Nation, 295 US 103 (1935), is typical of these cases which recognize that while a federal trustee may have some discretion in the management of Indian trust lands, this discretion does not extend to permitting misappropriation or destruction of the trust res, itself:

> It did not enable the United States to give the tribal lands to others ... for that would not be an exercise of guardianship but an action of confiscation. 295 US 109-110.

Accord., Shoshone Tribe v. United States, 299 US 476 (1937); Seminole Nation v. United States, 316 US 286 (1942). Such guardianship duties, of course, are not extinguished by the mere fact of a fee patent having issued where, as in this case, the patent has been fraudulently obtained. United States v. Debell, 227 F. 775, supra, p. 14. C.f. United States v. Raiche, 31 F2d 624 (7th Cir. 1928).

Montana Power Company v. Rochester, 127 F2d 189 (9th Cir. 1942), relied upon by both courts below to hold that the United States has no duty to protect Indian lands once a fee patent has issued is not to the contrary. That case assumes a fee patent has validly issued and does not even indirectly

address the status of the Government's responsibilities when the patent itself is assailed.

If, as the lower courts have held, the Crow Indians are precluded from recovering their fee lands by Montana statutes of limitation, and the Government, who would not be so barred (See, e.g. Minnesota v. United States, supra, p. 9; United States v. Thompson, 98 US 486 (1879); Gibson v. Chouteau, 80 US 534 (1871)), has no mandatory duty to institute litigation to recover the lands on their behalf, the effect is to strip them of their federal guardian as well as their lands. The decision of the Ninth Circuit is clearly an anomaly, both as a matter of policy and of federal Indian law, so as to warrant invoking the supervisory jurisdiction of this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

By, WILLIAM L. MADDEN, JR.
Member of the Firm
(On the Petition for Writ of Certiorari)

DATED this_____day of January, 1975.

AFFIDAVIT OF PROOF OF SERVICE

STATE OF MONTANA)
) ss.
County of Yellowstone)

I, WILLIAM L. MADDEN, JR., an attorney duly authorized to practice law in the state of Montana and the Courts of the United States of America, and member of the firm of Towe, Neely & Ball, 2525 Sixth Avenue North, Billings, Montana, attorneys of record for PHOEBE WILSON DILLON, Petitioner herein, depose and say that on the_____day of January, 1975, I served a copy of the foregoing PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for The Ninth Circuit on the several parties thereto, as follows:

1. On the United States, by mailing copies in duly addressed envelopes, First Class, postage prepaid, to:

Mr. Otis L. Packwood
United States Attorney
District of Montana
Federal Building
Billings, Montana 59101

2. On the United States, by mailing copies in a duly addressed envelope, with Air Mail postage prepaid, to:

THE SOLICITOR GENERAL
DEPARTMENT OF JUSTICE
Washington, D. C. 20530.

Mr. Kent Frizzel
Assistant Attorney General
Department of Justice
Washington, D. C. 20530

Messrs. George R. Hyde and
Glen R. Goodsell, Attorneys,
Department of Justice,
Washington, D.C. 20530

3. On the non-government Respondents herein, by mailing copies in a duly addressed envelope with First Class postage prepaid, to their respective attorneys of record, at their following addresses:

Rex F. Hibbs
Hibbs, Sweeney & Colberg
Mutual Benefit Life Building
Billings, Montana 59101; and

Cale Crowley
Crowley, Kilbourne, Haughey,
Hanson & Gallagher
500 Electric Building
P. O. Box 2529
Billings, Montana 59103.

William L. Madden, Jr.

SUBSCRIBED AND SWORN TO before me this_____day of January, 1975.

Notary Public for the State of Montana. Residing at Billings, Montana. My Commission Expires: 9/26/76.

(SEAL)

OPINION OF THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PHOEBE WILSON DILLON,

Plaintiff - Appellant,

v. D.C. No. 891

ANTLER LAND COMPANY of Wyola, a Montana Corp.; LITTLE HORN LAND COMPANY, a Montana Corporation; ANTLER LAND COMPANY, a Montana Corporation; LITTLE HORN LAND AND LIVESTOCK COMPANY, a Montana Corporation; UNION BANK AND TRUST COMPANY, Executor of the ESTATE OF BERTHA TSCHIRGI; REX HIBBS, Executor of the Estate of F. M. TSCHIRGI; FRANCIS J. MURTHA, as Trustee for TRUSTEES OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREA PENSION FUND; and the UNITED STATES OF AMERICA,

Defendants - Appellees.

No. 72-2176

OPINION

ANTLER LAND COMPANY of Wyola, a Montana Corp.; LITTLE HORN LAND COMPANY, a Montana Corporation; ANTLER LAND COMPANY, a Montana Corporation; LITTLE HORN LAND AND LIVESTOCK COMPANY, a Montana Corporation; UNION BANK AND TRUST COMPANY, Executor of the ESTATE OF BERTHA TSCHIRGI; REX HIBBS, Executor of the Estate of F. M. TSCHIRGI; FRANCIS J. MURTHA, as Trustee for TRUSTEES OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREA PENSION FUND;	No. 72-2205
Defendants - Cross-Appellants,	OPINION
v.	
PHOEBE WILSON DILLON,	
Plaintiff - Cross-Appellee.	

Appeal from the United States
District Court for the
District of Montana - Billings Division

Before: CHAMBERS and KOELSCH, Circuit Judges; McGOVERN*, District Judge

McGOVERN, District Judge:

In dispute here is title to 1,040 acres of grazing land on the Crow Indian Reservation in the State of Montana. Appellant Phoebe Wilson Dillon, then a minor Crow Indian, was awarded this land by trust patents in 1923 and 1924. Her father managed the land until she became of age. Not long after Appellant received her allotments, the land was leased to Matt Tschirgi, who later incorporated under the name of Antler Land Company. In 1949, Mrs. Dillon, at age 34, applied for and received competency status and undertook her own lease negotiations. She immediately increased her income from 14.32 cents per acre to 50 cents per acre.

On February 25, 1955, Mrs. Dillon applied for a fee patent. The application stated that the purpose was to enable her to sell the land. So far as the record shows, the only false statement made in the application for patent was that no person had asked Appellant to apply for patent in fee. This false representation was allegedly made because

*The Honorable Walter T. McGovern, United States District Judge for the Western District of Washington, sitting by designation.

Tschirgi advised Appellant that the patent in fee would not be issued if he were shown to be involved.

On May 21, 1955, Appellant agreed in writing to sell the land to Antler Land Company for $7,280 if and when she received the patent in fee, although such a contract for the sale of trust land is specifically prohibited by 25 U.S.C. §348. The fee patent application was approved by the Bureau of Indian Affairs on October 3, 1955, and a fee patent dated September 19, 1955, for the 1,040 acres was delivered to Appellant. On October 6, 1955, Appellant executed and delivered a warranty deed to Antler Land Company, and received $3,711.00 in cash. The balance of the $7,280 purchase price was accounted for by the items of advances mentioned in the May 21, 1955 contract, including a deduction for prepaid lease rentals. 25 U.S.C. §349 mandates that patent in fee land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent. The patent in fee and deed were recorded on October 14, 1955.

Additional facts disclosed at the trial indicate that Tschirgi assured Appellant on May 21, 1955 that if the Bureau of Indian Affairs appraised her land at more than $7 per acre, he would pay her the dollar difference. On August 23, 1955, the land was appraised

at $10 per acre, but Tschirgi refused to pay her the $3 difference per acre.

On the date of the conveyance, Antler Land Company was the owner of more than 1,920 acres of grazing land within the Crow Reservation and all the successors in interest of Antler Land Company (except Trustee Murtha) were likewise owners of more than 1,920 acres of reservation land at the time they acquired interest in the subject land.

On July 20, 1970, approximately fifteen years after the conveyance, Mrs. Dillon filed a complaint in United States District Court for the District of Montana against the Antler Land Company, the Little Horn Land and Livestock Company, the Union Bank and Trust Company as Executor of the Estate of Bertha Tschirgi, Rex Hibbs as Executor of the Estate of F. M. Tschirgi, Francis J. Murtha as Trustee for Trustees of — Central States, the Southeast and Southwest Areas Pension Fund, and the United States of America.

The complaint states two claims for relief. First, Mrs. Dillon seeks a decree adjudging the contract of May 21, 1955, and the deed of October 6, 1955, null and void, and quieting title to the land in herself or in the United States as her trustee and to recover rents and profits. In support of her first claim,

three theories are urged: (1) Fraud that vitiates the patent in fee from the United States to Appellant and the deed from her to Antler Land Company; (2) That while the land was in trust status, Appellant executed a contract to convey it in contravention of 25 U.S.C. §348; and (3) That Antler Land Company on the date of delivery owned lands in excess of the acreage limitations contained in Section 2 of the Crow Indian Allotment Act of 1920. Motions for Summary Judgment were directed to the first claim.

In her second claim, Mrs. Dillon seeks to recover $33,000.00, the alleged current fair market value of the land, in damages, under the Federal Tort Claims Act, 28 U.S.C. §1346(b), alleging that agents of the United States, by refusing to take action in her behalf with respect to the 1,040 acres, breached the duties enjoined on them by 25 U.S.C. §185. Pursuant to Rule 12(b) FRCP, the District Court considered the answer of the United States as a Motion for Summary Judgment.

The District Court held that the October 6, 1955 deed was voidable on the first and second theories advanced, and also void under Section 2 of the Crow Act of 1920 as applied to the purchaser. It further held, however, that the rights which Appellant had to avoid her deed on the grounds of fraud and because of the

violation of 25 U.S.C. §348, and the right, if she had any right to avoid the deed by reason of the violation of Section 2 of the Crow Act of 1920, were all barred by the Montana Statutes of Limitation, and that in the instant circumstances, Appellees have acquired title by adverse possession as against Appellant. Finally, the Court ruled that Appellant's second claim must also fail because there is no duty imposed by 25 U.S.C. §185 upon the United States to litigate the cases arising out of the dealings of emancipated Indians with fee lands, and, because in any event, the duty to sue could never be anything but a discretionary duty to which the Federal Tort Claims Act does not apply.

Appellant Dillon presents three assignments of error: (1) The holding of the District Court that the Montana Statutes of Limitation operate herein to bar any recovery by her; (2) The granting by the District Court of Summary Judgment in favor of the United States on Appellant's second claim, sua sponte, without notice to Appellant and without a reasonable opportunity to present material pertinent thereto as required by Rule 12(b); and, (3) The conclusion of the District Court that any duty to sue imposed on the United States by 25 U.S.C. §185 could never be anything but discretionary and therefore outside the purview of the Federal Tort Claims Act.

Appellees assign as error the holding that the subject deed of October 6, 1955, was void under Section 2 of the Crow Act of 1920.

This appeal raises troublesome questions, but that Montana law governs with respect to Appellant's property rights herein is not one of them. 25 U.S.C. §349 relied on by the District Court in holding that Appellant's first claim is barred by the Montana Statutes of Limitation[1] could scarcely be more explicit in this respect. It provides:

> "At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in Section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal of the State or Territory in which they may reside, and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law: Provided, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause

> to be issued to such allottee a patent in fee simple and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of said patent: Provided further that until the issuance of fee-simple patents all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States: ...." (Italics ours)

Appellant's argument and authorities on this issue consistently represent the natural concern of Congress and the Courts to protect Indians in the possession, enjoyment and authorized conveyance of restricted lands, but the acreage here involved falls outside that category. It is the subject of a patent in fee, the effect of which was to remove restrictions on its alienation and provide that the allottee should have the benefit of and be subject to the laws of the State of Montana. Appellant's contention that Section 349 is to be read to mean that only lands conveyed after the expiration of the trust period are expressly subject to state law is without merit.

In the trial court and here, Mrs. Dillon makes a strong attack on the validity of her deed to Antler Land Company. That argument also misses the point. The judgment which we affirm was not that Appellant's case against her deed lacked merit, but rather, that it is barred for lack of prosecution.

In her second claimed assignment of error, Appellant points out that the Defendant United States answered the Complaint, inter alia, in the language of Rule 12(b)(6). Defendants other than the United States, in a Separate Answer and a second Separate Answer and Cross-Complaint, denied Plaintiff Dillon's claims for relief against the United States or anyone else, denied that the Federal Torts Claims Act encompassed the claim for relief alleged, and moved for dismissal. The District Court treated the Motion to Dismiss the second claim as a Motion for Summary Judgment, and thereupon granted the Motion. This the Appellant assigns as error, charging that the action of the District Court deprived Appellant of notice and an opportunity to be heard with respect to its second claim, as provided for in the last sentence of Rule 12(b).

Appellant's second claim alleged a duty on the part of the United States to assert her first claim on her behalf. Her contention that she has been

deprived of the opportunity to argue the question of the Government's obligation to bring this action is contradicted by the record of the proceedings below. The issue was clearly before the District Court. In her original Memorandum and her Supplemental Citations of Authority to the trial court, Appellant developed at length her contentions with respect to federal jurisdiction, the responsibility of the United States to its Indian wards, and her exemption from state statutes when bringing an action which the United States as trustee allegedly had an "absolute duty" to bring under 25 U.S.C. §185. The District Court's disposition of Appellant's second cláim by way of Summary Judgment was made in spite of those contentions and was neither prejudicial nor erroneous.

Appellant's third assignment of error attacks the trial court ruling by summary judgment against her second claim on the grounds that 25 U.S.C. §185, which provides:

> "Whenever any Indian, being a member of any band or tribe with whom the Government has or shall have entered into treaty stipulations, being desirous to adopt the habits of civilized life, has had a portion of the lands belonging to his tribe allotted to him

> in severalty, in pursuance of such treaty stipulations, the agent and superintendent of such tribe shall take such measures, not inconsistent with law, as may be necessary to protect such Indian in the quiet enjoyment of the lands so allotted to him. R.S. §2119."

imposes no duty upon the United States to litigate the cases arising out of the dealings of emancipated Indians with fee lands, and, secondly, because in any event, the duty to sue could never be anything but a discretionary duty to which the Federal Tort Claims Act does not apply. The issue underlying this assignment of error is well stated by Appellant: Does 25 U.S.C. §185 impose a mandatory duty on the United States to litigate cases arising out of the dealings of emancipated Indians with fee lands, the breach of which is actionable under the Federal Tort Claims Act?

Standing against the contentions of Appellant on this issue is the logic and the weight of authority in support of the proposition adopted by the trial court, namely, that issuance of the fee patent freed the United States from its duties and obligations to the Indians with respect to the lands it theretofore held in trust and defined the new status of those Indians in their relation to the

State. See Montana Power Company v. Rochester, 127 F.2d 189, 192 (9th Cir., 1942). We concur in the ruling of the trial court.

Appellant does not separately assign as error the holding of the District Court that Appellees under the instant circumstances have acquired title as against Appellant to the subject land by adverse possession. Instead, Appellant's arguments on the question of adverse possession are stated in support of reasons advanced against the applicability of the Montana Statutes of Limitation. Indeed, Appellant's position with respect to adverse possession necessarily and in fact raises the same fundamental questions raised by her position on the applicability of the Montana Statutes of Limitation, to wit: Does federal law in these circumstances prohibit the acquisition of fee patent Indian land by adverse possession? We hold that it does not. 25 U.S.C. §349 not only authorizes but requires the application of Montana law in the instant circumstances and, therefore, the issues relative to adverse possession are resolved accordingly.

Finally, Appellees appeal from the ruling that the deed of October 6, 1955 was void as in violation of Section 2 of the Crow Act of 1920.

The District Court held that pursuant to Section 2 of the Crow Act of 1920, Antler Land Company on October 6, 1955, already in possession of Crow land in excess of 1,920 acres, was ineligible to take the 1,040 acres which was the subject of the warranty deed herein. We note that the District Court in its Opinion and Order expressly declined to decide whether an Indian who sold to a buyer ineligible to take land by reason of Section 2 of the Crow Act may bring an action to recover the land. Having otherwise disposed of the case on appeal, we, too, decline to needlessly pass on such issue.

The judgment of the trial court is affirmed.

FOOTNOTE

1/ RCM 93-2504 No action for the recovery of real property, or for the possession thereof, can be maintained, unless it appears that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question within five years before the commencement of the action.

RCM 93-2607 provides for a two-year limitation period.

Subsection (4): An action for relief on the ground of fraud or mistake, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

OPINION AND ORDER OF THE
UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MONTANA,
BILLINGS DIVISION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

PHOEBE WILSON DILLON, Plaintiff, v. ANTLER LAND COMPANY of Wyola, a Montana corporation; LITTLE HORN LAND COMPANY, a Montana corporation; ANTLER LAND COMPANY, a Montana corporation, LITTLE HORN LAND AND LIVESTOCK COMPANY, a Montana corporation; UNION BANK AND TRUST COMPANY, Executor of the Estate of BERTHA TSCHIRGI; REX HIBBS, Executor of the Estate of F. M. TSCHIRGI; FRANCIS J. MURTHA, as Trustee for TRUSTEES OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND; and THE UNITED STATES OF AMERICA, Defendants.	Civil No. 891 OPINION AND ORDER

In October 1955 plaintiff, a Crow Indian, sold 1040 acres of land to the Antler Land Company of Wyola (hereafter

Antler Land). In June 1970 she filed this action. In her first claim she seeks to vest the title to the land in herself or in the United States as her trustee and to recover rents and profits.

In support of the first claim, three theories, all stemming from plaintiff's status as an Indian, are urged: first, that there was fraud which vitiated the patent from the United States to plaintiff and the deed from her to Antler Land; second, that while the land was in trust status plaintiff executed a contract to convey in which, under the provisions of the General Allotment Act, [1] made the subsequent deed invalid; and third, that Antler Land on the date of the delivery of the deed owned lands in excess of the acreage limitations contained in Section 2 of the Crow Indian Allotment Act.[2] Motions for summary judgment are directed to the first claim.

In her second claim plaintiff seeks to recover $33,000.00 in damages, alleging that the agents of the United States, by refusing to take action in her behalf with respect to the 1040 acres, breached the duties enjoined upon them by 25 U.S.C. §185. [3] A motion to dismiss is directed to the second claim. Pursuant to Fed. R. Civ. P. 12(b) the court considers matters outside the pleadings and treats the motion to dismiss the second claim as a motion for summary judgment.

On the motions for summary judgment the court considers the defendant's answers to interrogatories and requests for admissions where favorable to plaintiff, the plaintiff's answers to interrogatories and requests for admissions, the affidavit of plaintiff in toto[4] and the affidavits filed on behalf of defendants to the extent they are not contraverted. From all of this the following facts appear:

The Crow Reservation was created by treaty on May 7, 1868.[5] The lands here involved were within the reservation. They were allotted to plaintiff while she was still a minor by trust patents issued in 1923 and 1924. These patents provided that the United States would hold the lands in trust for 25 years and at the end of the trust period ". . . convey the same by patent to said Indian in fee, discharged of said trust and free from all charges and encumbrances whatsoever."

Plaintiff's father managed the land for her for some years. Matt Tschirgi[6] leased the land from plaintiff's father and later leased it through the Indian agency. On April 12, 1949, plaintiff was placed on the list of competent Crow Indians under the authority of the Crow Indian Allotment Act.[7] When plaintiff was declared to be competent she undertook the leasing and increased the rental from 14.23 cents per acre to 50 cents per

acre. Tschirgi took advantage of the plaintiff's need for money and utilized a scheme prevalent on the reservation whereby leases were made for five years with rentals payable in whole or in part in advance. When the advance payments had been spent the white ranchers, including Tschirgi, were then in a position to apply economic pressure upon the Indians to obtain future concessions. Tschirgi's purpose was to obtain the land or the use of it for as little as possible and without regard for the values involved. In 1955 at a time when plaintiff needed money Tschirgi refused to advance any except on the condition that plaintiff apply for a fee patent. Upon her agreement to apply he loaned her $100.00

On February 25, 1955, plaintiff applied for a fee patent. Tschirgi instructed plaintiff as to all of the representations that should be made to the Indian agency in order to obtain the fee patent, and she followed his instructions.

On May 21, 1955, she entered into a written contract to sell the land to Antler Land for $7280.00. A portion of the purchase price was a credit on advances previously made, and a sum of $570.00 was advanced on the date of the contract. At the time of the execution of the contract Tschirgi promised that he would,

notwithstanding the written contract which called for a purchase price of $7.00 per acre, pay plaintiff whatever the appraised value of the land turned out to be. On August 23, 1955, the land was appraised at $10,400.00.

The application for a fee patent was approved after an investigation, and on October 3, 1955, a fee patent dated September 19, 1955, was delivered to plaintiff who on that date issued her receipt for it. On October 6, 1955, she executed and delivered a warranty deed to Antler Land. Plaintiff received $3,711.00 in cash. The balance of the purchase price was accounted for by the items of advances mentioned in the contract, including a deduction for prepaid lease rentals.

Before plaintiff executed the deed she asked Tschirgi what the appraised value was and Tschirgi told her that the appraised value was unimportant because she was bound by the contract which she had signed. Following the execution of the deed plaintiff determined that the appraised value was $10.00 per acre and asked Tschirgi for the additional money. He refused.

So far as the record here shows the only false statement made in the application for the patent was that no person had asked plaintiff to apply for a patent

in fee. This false representation was made because Tschirgi advised plaintiff that the patent would not be issued if he were shown to be involved. As previously noted the contract to sell was dated May 1955, and the fact of its existence was not reported to the Indian agency although the application previously filed in February 1955 had stated that there were no contracts to sell. The application did state that the purpose for seeking the fee patent was to enable plaintiff to sell the land. There is nothing in the records of the Bureau of Indian Affairs which indicates that Tschirgi himself made any representations relative to the patent application.

The patent and deed were placed of record as of October 14, 1955. On the date of the conveyance Antler Land was the owner of more than 1,920 acres of grazing land within the Crow Indian Reservation and all of the successors in interest of Antler Land (except Murtha, trustee, the mortgagee) were likewise the owners of in excess of 1,920 acres of reservation lands at the time they acquired their interests in the land.

In the patent application plaintiff represented that she was competent and gave references to persons who could and did vouch for her competence. The finding of competency is not one merely implied from the issuance of the fee

patent but is a considered finding made by the Superintendent of the Reservation and approved by the Area Director.[8] It is not claimed that there were misrepresentations made in the application proceedings which related to the issue of plaintiff's competency and plaintiff does not now assert that she was incompetent either in 1949 when first placed on the competent rolls or in 1955 when the patent issued.

It is my opinion, based on the facts I am obliged to assume in considering the motion for summary judgment, that the deed from plaintiff to Antler Land was voidable on the first (ordinary fraud) and second (violation of 25 U.S.C. §348) theories presented and void on the third (violation of Section 2 of Act of June 4, 1920, 41 Stat. 471).

With respect to the first theory -- that of fraud as it relates to the validity of the deed -- there may be a genuine issue of material fact and it cannot be held that the defendants are entitled to a judgment on that issue as a matter of law.

As to the second theory:

The contract of May 21, 1955, made before the issuance of the trust patent, was void. The existence of the contract did not, however, prevent the plaintiff and Tschirgi from dealing with the land

after the issuance of the trust patent,[9] provided that there was a new meeting of the minds and that a subsequent deed resulting from those dealings was not a product of the contract. If as claimed here Tschirgi exerted economic pressure upon plaintiff to secure a contract in violation of the congressional policy expressed in 25 U.S.C. §§ 348 and 349[10] and then after the issuance of the fee patent Tschirgi secured a deed by misrepresentations or by reason of the mistaken belief of plaintiff that she was obliged to perform the contract, then the deed is the illegal fruit of an illegal contract. In short, if it is shown as a fact that the contract was a factor inducing the execution of the deed, the deed was voidable.

As to the third theory:

The original deed conveying the land to Antler Land was accepted by Antler Land in violation of Section 2 of the Crow Act and was void. Defendants seriously urge that Section 2 relates only to conveyances of trust lands. The report of the conference committee indicates that the purpose of Section 2 of the Crow Act was to prevent any one person from accumulating large holdings on the reservation. Thus the statement of the House managers accompanying a conference committee report said ". . . it is not thought to be either good public policy

or for the best interests of the Indians to permit any one person, firm or corporation to acquire any great acreage of the land. . . ."[11] The same thought is expressed elsewhere in the legislative history.[12] Section 2 poorly effectuates this legislative purpose because it did not absolutely prohibit large holdings on the reservation in that it forbade only the initial conveyances by or on behalf of the Indians. Thus if corporations A through J inclusive each made an independent purchase of 920 acres of Crow lands and then corporations A through I all lost their lands on mortgage foreclosures, the act did not prohibit corporation J from purchasing at the foreclosure sales and accumulating in this manner 9,200 acres of Crow land. Even so, if the purpose was to prohibit large holdings there was no reason to distinguish between conveyances made or approved by the Secretary of the Interior of trust lands and conveyances by the Indians of fee lands -- the effect in terms of size of the holdings was the same in either case.

Certainly the first sentence, "[n]o conveyance of land by any Crow Indian shall be authorized or approved by the Secretary of the Interior," does relate to conveyances required to be approved by the Secretary. But the second sentence, "[a]ny conveyance by any such Indian," relates to conveyances by Indians. The

words "such Indian" in the second sentence relate back to the words "Crow Indian" in the first sentence. The fact that the first sentence deals with Secretarial approval does not require that the words "Crow Indian" appearing in the first sentence and adopted by the word "such" in the second sentence be modified in the adoption by the addition of the words "whose land is in trust status." It does less violence to the language of Section 2 to hold that the first sentence relates to the Secretary of the Interior and the second sentence relates to Crow Indians than to hold that the words "any conveyance by any such Indian" do not mean <u>any</u> conveyance but only conveyances of trust land.

The words "whether held by trust patent or by patent in fee" make it impossible to relate the second sentence of Section 2 to trust lands only. Defendants urge that these words somehow refer to the grantee purchaser's title. As to grantees who are white persons or corporations the words "whether held by trust patent" simply have no meaning because a white grantee would never hold by a trust patent. If we eliminate the descriptive words in the second paragraph it reads: "Any conveyance by any such Indian made. . . of. . . land. . . whether held by trust patent or by patent in fee shall be void." On such reading it is apparent

that the "whether held" clause relates to the word "land."

Defendants likewise urge that to apply Section 2 of the Crow Act to patent-in-fee lands puts Section 2 in conflict with that part of 25 U.S.C. §349 which reads as to patent-in-fee lands ". . . and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed. . . ." In my opinion the effect of Section 2 of the Crow Act was to limit the power of a buyer to buy. The Indian was not forbidden to sell; the penalty was directed solely at the buyer. It is true that Section 2 of the Crow Act did limit the market for Indian land to small landowners and big ones willing to gamble, but it did not place a restriction on the power of the Indian to sell or encumber his land. Many laws limit the capacity of persons and corporations to own land. Such limitations appear in connection with federally financed irrigation districts, aliens, and corporate powers. Such laws relate to the capacity to buy and own, not to the capacity of an owner to sell. It cannot be said therefore that Section 2 of the Crow Act, which limited the capacity of buyers to acquire Indian lands, placed a restriction as to sale or encumbrance of the lands contrary to 25 U.S.C. §349.

It is my opinion that the rights which plaintiff had to avoid her deed on the

ground of fraud and because of the violation of 25 U.S.C. §349 and the right, if she had any right, [13] to avoid the deed by reason of the violation of Section 2 of the Crow Act are all barred by the Montana Statutes of Limitations.

The General Allotment Act throughout its history [14] has and the Crow Act does distinguish the competent from the incompetent Indian and the trust lands from the fee lands. State law controls here because Congress has explicitly said that it does. The language of 25 U.S.C. §349 is ". . . when the lands have been conveyed to the Indians by patent in fee . . . then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State. . . ." [15]

The patent exists. It has not been cancelled.

Plaintiff argues that the United States might bring an action on plaintiff's behalf to cancel the patent and that state limitations would not bar such an action. It is not necessary to decide what right the United States might have in this case to sue on behalf of the plaintiff because the United States not only has not done so, but has refused to do so. For very substantial reasons the plaintiff may not, by joining the United States as a party defendant,

force the United States to accept the role of party plaintiff or equate her rights with the rights which the United States might assert did it choose to assert them. The determination that the plaintiff was competent and the decision to issue her a fee patent were executive decisions made for the purpose of ending the trusteeship. The decision carried out an apparent congressional policy to put Indians into the mainstream of American life when competent to manage their own affairs. ~~The declaration of competency~~ The issuance of the fee patent had a broader effect [16] than merely to free plaintiff to sell her land -- it freed the United States from its trustee duties and altered the relationship of the land and plaintiff to the State of Montana. Whether the United States should, assuming a right to do so, now bring an action to set aside those executive decisions by cancelling the patent and restoring the plaintiff to her dependent status poses an executive problem to be answered in the exercise of the wide discretion vested in the Attorney General of the United States. [17] The question of whether the United States should bring such an action or should leave the fee patent Indian to the remedies afforded her by private litigation under state law involves considerations different from the issues to be resolved in the lawsuit itself. See United States v. Minnesota, 270 U.S. 181 (1926); Smith v.

United States, 375 F.2d 243 (5th Cir. 1967). An attorney general might in his discretion conclude that Indians should not slip in and out of the trust status at the will of the Indian, that an Indian who sought a declaration of competency and who does not now claim to have been incompetent, and who if there was fraud leading to the procurment of the patent was a participant in the fraud, should not utilize the energies of the United States to revoke a finding of competency which is not even now said to be incorrect to protect rights which the Indian could have protected in litigation conducted by herself.

The point of all this is that before the United States becomes a plaintiff in a lawsuit an executive decision must be made. It has not been made in this case.[18] Plaintiff, by joining the United States, cannot make that executive decision for the United States, nor can the plaintiff empower this court to make that decision. 28 U.S.C.§1361 giving the district courts jurisdiction of mandamus actions to compel an officer of the United States to perform a duty owed to plaintiff would not, assuming proper parties, permit the court to compel the exercise of a discretionary duty.[19]

The duty of the United States is said to arise under 25 U.S.C. §185.[20] This section, enacted in 1862, remains in its

initial form. It does cast upon the Indian agents and superintendents a duty to protect Indians in the enjoyment of their allotments. To hold, however, that it imposes a duty in the United States or its agents to litigate all title problems which may be created by an emancipated Indian dealing with lands which as indicated are subject to state law would be to ignore the subsequently enacted laws governing Indians. 25 U.S.C. §185 does not, in light of the previously quoted language from the General Allotment Act and the Crow Act, continue forever the trusteeship of the United States over the fee lands of emancipated Indians [21] and does not impose a duty in the United States to litigate cases arising out of the dealings by Indians with their patent-in-fee lands.

In short, this is an action brought by a competent plaintiff to enforce individual rights. It is not an action by the United States or the equivalent of an action by the United States. State limitations apply.

The facts bearing upon the adverse possession problem are largely admitted. It is agreed that: the defendants have at all times since October 6, 1955, claimed to be the legal owners of and have continuously occupied, possessed, and used the lands described in the complaint for the agricultural and ranching

purposes for which said lands are suitable; have paid all of the taxes legally levied and assessed; have over the period from September 1955 to January 25, 1967, placed of public record, in addition to the patent, six documents disclosing defendants' claims to all or a part of the lands involved. It appears by an uncontradicted affidavit that the lands were enclosed by a fence. The facts bearing upon the claim of fraud were known by plaintiff as early as 1956, and the other facts were known by the plaintiff as they developed.

Under these circumstances the defendants have acquired a title by adverse possession as against the plaintiff.[22] It is not necessary to decide whether a void deed may constitute color of title[23] because a claim of title not founded upon a written instrument may ripen into a title by adverse possession if as here the requirements of R.C.M. 1947 §§93-2510 and 2511 are met.[24]

Plaintiff urges that the Montana Statutes of Limitations should be tolled during the period within which plaintiff was attempting to get the United States to bring this action. The answer to this, as to most of plaintiff's contentions, is that state law does control and there is nothing in the law which tolls limitations on the suggested grounds.

The second claim is, as previously indicated, asserted against the United States under the Federal Tort Claims Act[25/] for the failure of the United States to assert on plaintiff's behalf the claims made by her in her first claim in this action. It fails because, first, as previously indicated, there is no duty imposed by 25 U.S.C. §185 upon the United States to litigate the cases arising out of the dealings of emancipated Indians with fee lands and, second, because in any event the duty to sue could never be anything but a discretionary duty to which the Federal Tort Claims Act does not apply.[26/]

IT IS THEREFORE ORDERED that a summary judgment be entered denying plaintiff the relief sought under the first and second claims and quieting the defendants' title against the plaintiff. The defendants shall prepare a judgment pursuant to Rule 14(b) of the Rules of this Court.

DATED this 13th day of April, 1972.

Russell E. Smith
United States District Judge

APPENDIX A

Sec. 2. No conveyance of land by any Crow Indian shall be authorized or approved by the Secretary of the Interior to any person, company, or corporation who owns at least six hundred and forty acres of agricultural or one thousand two hundred and eighty acres of grazing land within the present boundaries of the Crow Indian Reservation, nor to any person who, with the land to be acquired by such conveyance, would become the owner of more than one thousand two hundred and eighty acres of agricultural or one thousand nine hundred and twenty acres of grazing land within said reservation. Any conveyance by any such Indian made either directly or indirectly to any such person, company, or corporation of any land within said reservation as the same now exists, whether held by trust patent or by patent in fee shall be void and the grantee accepting the same shall be guilty of a misdemeanor and be punished by a fine of not more than $5,000 or imprisonment not more than six months or by both such fine and imprisonment.

The classification of the lands of such reservation for the purpose of allotment and the allotment thereof shall be made as provided in the Act of Congress approved June 25, 1910 (Thirty-sixth Statutes at Large, page 859), which classification with any heretofore made

by authority of law as to lands heretofore allotted shall be conclusive, for the purposes of this section, as to the character of the land involved.

Act of June 4, 1920, ch. 224, 41 Stat. 741.

APPENDIX B

This opinion does not decide whether an Indian who sold to a buyer ineligible to take lands by reason of Section 2 of the Crow Act may bring an action to recover the land. In somewhat analogous situations grantors who have been paid by a grantee lacking power to take are not permitted to recover the thing sold. See Abrams v. State of Washington, 45 Wash. 327, 88 P. 327 (1907); Fairfax v. Hunter, 11 U.S. (7 Cranch) 603 (1812); Craig v. Radford, 16 U.S. (3 Wheat.) 594 (1818), all involving aliens; and Fritts v. Palmer, 132 U.S. 282 (1889); Benedict v. Bd. of Comm'rs. of Lincoln County, 161 Okla. 50, 17 P.2d 454 (1932), Texas County v. State, 198 Okla. 565, 180 P.2d 631 (1947); Kerfoot v. Farmers' and Merchants' Bank, 218 U.S. 281 (1910); Long v. Georgia Pac. R.R., 91 Ala. 519 8 So. 706 (1891); Parish v. Wheeler, 22 N.Y. 494 (1860), all dealing with corporations which for some reason lack a power to take.

Pointing in a different direction, however, the cases dealing with statutes which make any conveyance of land void may be thought to be persuasive in the interpretation of Section 2 of the Crow Act, which makes conveyances to certain persons void. See Heckman v. United States, 224 U.S. 413 (1912) (dictum); Gerhard v. United States, 167 F.2d 951

(9th Cir. 1948); Colombe v. Wilson, 29 S.D. 49, 135 N.W. 668 (1912).

FOOTNOTES

1/ 25 U.S.C. §348 provides: "And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void . . . ."

2/ See Appendix A attached.

3/ "Whenever any Indian, being a member of any band or tribe with whom the Government has or shall have entered into treaty stipulations, being desirous to adopt the habits of civilized life, has had a portion of the lands belonging to his tribe allotted to him in severalty, in pursuance of such treaty stipulations, the agent and superintendent of such tribe shall take such measure, not inconsistent with law, as may be necessary to protect such Indian in the quiet enjoyment of the lands so allotted to him. R.S. §2119."

4/ On a trial on the merits the plaintiff might not be able to prove the facts stated in her affidavit and some of the inferences which the court draws from the affidavit might be unfounded.

5/ 15 Stat. 649 (1868).

6/ Matt Tschirgi was the alter ego of Antler Land, and his acts are treated as the acts of Antler Land in this opinion.

7/ 41 Stat. 755 (1920).

8/ The authority of the Superintendent and the Area Director are delineated by 25 C.F.R. §121.2 (1972) and Commissioner's Order 551, §§ 3 and 4, 16 Fed. Reg. 2939 (1951).

9/ Andreas v. Henderson, 160 F. Supp. 252 (S.D. Cal. 1958).

10/ The contract here in effect made the land liable for debts incurred prior to the issuance of the fee patent in violation of the policy expressed in 25 U.S.C. §349 as follows: ". . . and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent. . . ."

11/ H.R. Rep. No. 1043, 66th Cong., 2d Sess. 3-4 (1920).

12/ H.R. Rep. No. 789, 66th Cong., 2d Sess. (1920).

13/ See Appendix B attached.

14/ Act of Feb. 8, 1887, Ch. 119, §5, 24 Stat. 389-390; Act of May 8, 1906, Ch. 2348, 34 Stat. 182, now codified as 25 U.S.C. §§ 348 and 349.

15/ See Larkin v. Paugh, 276 U.S. 431 (1928); Dickson v. Luck Land Co., 242 U.S. 371 (1917); United States v. Waller, 243 U.S. 452 (1917); Bonds v. Sherburne Mercantile Co., 169 F.2d 433 (9th Cir. 1948).

16/ See Montana Enabling Act, Act of Feb. 22, 1899, §4, 25 Stat. 676; and Ordinance No. 1, Mont. Const., R.C.M. 1947, Vol. 1, pt. 1, p. 328; Montana Power Co. v. Rochester, 127 F.2d 189 (9th Cir. 1942).

17/ 28 U.S.C. §515; Sutherland v. International Ins. Co. of New York, 43 F. 2d 969 (2d Cir. 1930); Parker v. Kennedy, 212 F. Supp. 594 (S.D.N.Y. 1963).

18/ To treat this case as an action by the United States it would be necessary to ignore the motion to dismiss filed by the United States Attorney and treat the actions of the plaintiff's counsel as those of the United States. This obviously cannot be done. Sutherland v. International Ins. Co. of New York, supra.

19/ Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364 (10th Cir. 1966); Mollohan v. Gray, 413 F.2d 349 (9th Cir. 1969); United States v. Walker, 409 F.2d 477 (9th Cir. 1969); Dodge v. Nakai, 298 F. Supp. 17 (D.Ariz. 1968).

20/ Supra at n.3.

21/ Montana Power Co. v. Rochester, supra.

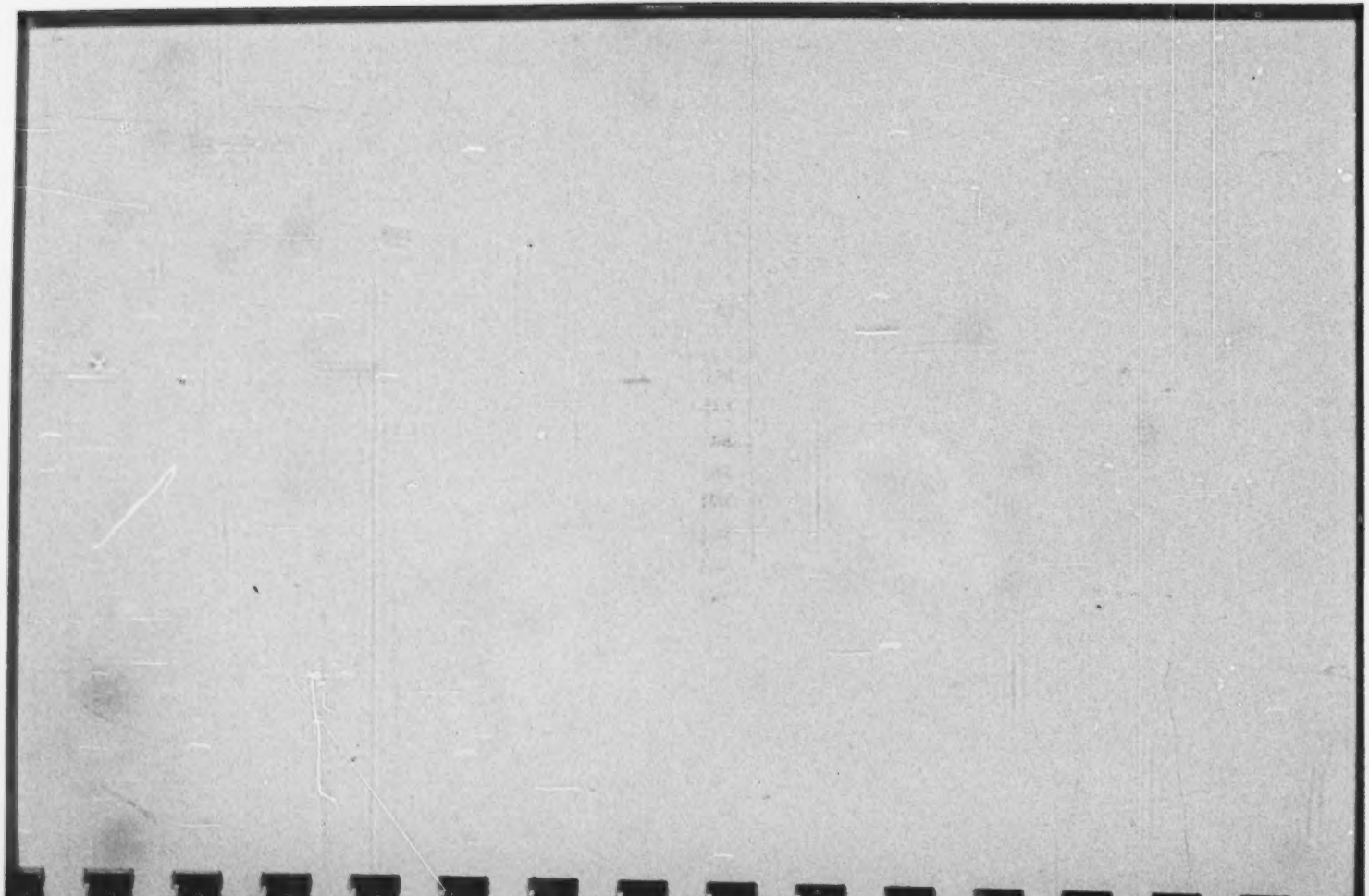
22/ What is said here does not purport to affect the right of the United States to enforce, if it has a right to do so, the policy expressed by Section 2 of the Crow Act, whatever that policy may be.

23/ There is some indication that under Montana law it may. Hentzy v. Mandan Loan and Investment Co., 129 Mont. 324, 286 P.2d 325 (1955).

24/ Thibault v. Flynn, 133 Mont. 461, 325 P.2d 914 (1958).

25/ 28 U.S.C. § 1346(b).

26/ 28 U.S.C. § 2680(a).



ORDER AMENDING OPINION AND ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

PHOEBE WILSON DILLON, Plaintiff, v. ANTLER LAND COMPANY of Wyola, a Montana corporation; LITTLE HORN LAND COMPANY, a Montana corporation; ANTLER LAND COMPANY, a Montana corporation, LITTLE HORN LAND AND LIVESTOCK COMPANY, a Montana corporation, UNION BANK AND TRUST COMPANY, Executor of the Estate of BERTHA TSCHIRGI; REX HIBBS, Executor of the Estate of F. M. TSCHIRGI; FRANCIS J. MURTHA, as Trustee for TRUSTEES OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND; and THE UNITED STATES OF AMERICA, Defendants.	)	Civil No. 891 ORDER

The opinion in the above entitled case dated April 13, 1972, is amended as follows:

The words "The declaration of competency" in line 5 on page 15 are stricken and in their place is substituted the words "The issuance of the fee patent."

The court has this day shown the change on the original opinion.

Russell E. Smith
United States District Judge

Act of June 4, 1920, Sec. 2
(41 Stat. 695)

SEC. 2 No conveyance of land by any Crow Indian shall be authorized or approved by the Secretary of the Interior to any person, company, or corporation who owns at least six hundred and forty acres of agricultural or one thousand two hundred and eighty acres of grazing land within the present boundaries of the Crow Indian Reservation, nor to any person who, with the land to be acquired by such conveyance, would become the owner of more than one thousand two hundred and eighty acres of agricultural or one thousand nine hundred and twenty acres of grazing land within said reservation. Any conveyance by any such Indian made either directly or indirectly to any such person, company, or corporation of any land within said reservation as the same now exists, whether held by trust patent or by patent in fee shall be void and the grantee accepting the same shall be guilty of a misdemeanor and be punished by a fine of not more than $5,000 or imprisonment not more than six months or by both such fine and imprisonment.

Rule 12(b) Fed. R. Civ. P.

(b) How Presented. ... If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

25 USC § 185

§ 185. Protection of Indians desiring civilized life.

Whenever any Indian, being a member of any band or tribe with whom the Government has or shall have entered into treaty stipulations, being desirous to adopt the habits of civilized life, has had a portion of the lands belonging to his tribe allotted to him in severalty, in pursuance of such treaty stipulations, the agent and superintendent of such tribe shall take such measures, not inconsistent with law, as may be necessary to protect such Indian in the quiet enjoyment of the lands so allotted to him. (R.S. §2119).

25 USC § 348

§ 348. Patents to be held in trust-Descent and partition.

Upon approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made ... and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever.... (Feb 8, 1887, c 119, §5, 24 Stat. 389; Mar 3, 1901, c 832, §9, 31 Stat. 1085)

25 USC § 349

§ 349. Patents in fee to allottees

At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this act [25 USC § 348], then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; ... Provided, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: Provided further, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States.... (Feb. 8, 1887, c 119, §6, 24 Stat. 390; May 8, 1906, c. 2348, 34 Stat. 182.)

In the Supreme Court

of the

United States

October Term 1974

No.....

PHOEBE WILSON DILLON,

Petitioner,

vs.

ANTLER LAND COMPANY of Wyola, a Montana corporation; LITTLE HORN LAND COMPANY, a Montana Corporation; ANTLER LAND COMPANY, a Montana corporation; LITTLE HORN LAND AND LIVESTOCK COMPANY, a Montana corporation; UNION BANK AND TRUST COMPANY, Executor of the ESTATE OF BERTHA TSCHIRGI; REX HIBBS, Executor of the ESTATE of F. M. TSCHIRGI; FRANCIS J. MURTHA, as Trustee for TRUSTEES OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREA PENSION FUND; and THE UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF NONGOVERNMENTAL RESPONDENTS IN OPPOSITION

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In the Supreme Court

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No.....

PHOEBE WILSON DILLON,

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ANTLER LAND COMPANY of Wyola, a Montana corporation; LITTLE HORN LAND COMPANY, a Montana Corporation; ANTLER LAND COMPANY, a Montana corporation; LITTLE HORN LAND AND LIVESTOCK COMPANY, a Montana corporation; UNION BANK AND TRUST COMPANY, Executor of the ESTATE OF BERTHA TSCHIRGI; REX HIBBS, Executor of the ESTATE of F. M. TSCHIRGI; FRANCIS J. MURTHA, as Trustee for TRUSTEES OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREA PENSION FUND; and THE UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF NONGOVERNMENTAL RESPONDENTS IN OPPOSITION

STATUTES INVOLVED

A. *GENERAL STATUTES OF UNITED STATES APPLICABLE.*

1. General Allotment Act; *February 8, 1887; 24 Stat. 388,* See *25 U.S.C. 339, 348, 353.*

2. Montana's Enabling Act; *February 22, 1889;* Accepted *October 1, 1889; 25 Stat. 676.*

3. *May 8, 1906; 34 Stat. 182, 25 U.S.C. 349,* amending General Allotment Act.

B. *SPECIAL STATUTES OF UNITED STATES APPLICABLE.*

1. Crow Allotment Act of *June 4, 1920; 41 Stat. 751.*

Note that *Section 1* provides that allotments made shall vest title in the allottee evidenced by "patents in fee to competent Indians * * * but by trust patent to minors and incompetent Indians, the force and legal effect of the trust patents to be as prescribed by the General Allotment Act of *February 8, 1887, (Twenty Fourth Statutes, page 388).*"

The legislative history suggests Congressional intent to subject the legal effect of patents in fee to competent Indians as provided by the Amendments to the General Allotment Act including in particular the *1906* Amendment, now *25 U.S.C. 349,* as construed by this Supreme Court in *1916.*

2. *May 26, 1926; 44 Stat. 658.*

Note that *Section 1* of the Crow Allotment Act of *1920* was purposely amended to provide that allotments made vested title in the allottee "evidenced by patents in fee to competent Indians * * * but by trust patents to minors and incompetent Indians,

> the force and legal effect of the trust patents to be as is prescribed by the General Allotment Act of *February 8, 1887, as amended* * * * ; thus expressly providing in *Section 1* of the Crow Act that all patents issued thereafter clearly had the legal force and effect as provided by *25 U.S.C. 349.*

C. *LEGISLATIVE HISTORY.*

We can refer the Court to only that part of the pertinent legislative history which has been made known to us. We have no source for such material in the State of Montana.

All reports in *1919* were 66th Congress, 1st Session. Those in *1920,* 66th Congress, 2nd Session. Those in *1926,* 69th Congress, 1st Session.

1. *September 23, 1919.* Senate Report No. 219, Calendar No. 183, to accompany #2890, "Crow Tribe of Indians of Montana."

2. *October 20-22, 1919, pp. 7173-7175, pp. 7316,* Senate Congressional Record.

3. *November 5, 1919,* House Hearings Before a Subcommittee of the Committee of Indian Affairs, *pp. 12-47,* "Indian Tribes of Montana." See excerpts in *Appendix A.*

4. *November 24, 1919,* House Report No. 468, to accompany #2890, "Allotment of Land, Crow Tribe of Indians."

5. *February 5, 1920,* House Congressional Record, *pp. 4016-4018.*

6. *March 19, 20, 1919,* House Hearings of Committee on Indian Affairs, *pp. 1-112,* "Crow Tribe of Indians in Montana."

7. *April 5, 1920,* to accompany #2890, House Report No. 789, "Allotment of Lands of the Crow Tribe for the Distribution of Tribal Funds.

8. *April 22, 1920,* excerpts from House Congressional Record explaining the purpose of the Bill after it had been finalized by Committee Hearings. *Pp. 5990* through *6001; 6006* through *6012* (See excerpts in *Appendix B*); *pp. 7844* through *7846; 7874.*

9. *February 8, 1926,* House Report No. 228 on Act to Amend Crow Act of *June 4, 1920,* incorporated in later Senate Report 639, Calendar No. 635, "To Amend Sections 1 * * * of an Act approved *June 4, 1920,* * * *" (*See Appendix C*).

10. *May, 1926,* Senate Congressional Record, *pp. 9073.*

D. *MONTANA STATUTES APPLICABLE.*

R.C.M. 1947—Sections 93-2504; 93-2505; 93-2507 through *2513.*

QUESTIONS PRESENTED

The factual conditions precedent for grant of certiorari required by Supreme Court *Rule 19(1)(b)* do not exist in this case. The decision by the Ninth Circuit Court is wholly consistent with prior decisions by

this Supreme Court on comparable fact and legal issues. There is no decision to the contrary by any Court considering a comparable fact situation.

Furthermore, we do not agree that the Petition accurately presents the controlling issues. On *September 15, 1955,* pursuant to statutory authority, the government of the United States issued to petitioner a patent in fee only after a very careful, very thorough, very exhaustive administrative investigation. It has never been set aside. There is no factual basis upon which it could be set aside.

1. Is there any case law, or any statute, that authorizes this petitioner to collaterally attack and set aside the patent in fee which the United States issued to her?

2. Whether or not the United States shall in any case file an action to set aside a patent in fee is a sovereign prerogative of the United States to decide. Is there any statute or case law authority that authorizes this petitioner to collaterally mandamus the United States to make that sovereign governmental decision?

3. As long as that patent in fee of *September 15, 1955,* remains outstanding, it carries this statutory legal effect provided by *25 U.S.C. 349*—the title previously vested in the United States was extinguished; all restrictions upon sale, incumbrance, or taxation were removed from the lands; petitioner became a citizen of the United States with all the privileges and immunities of such citizenship; petitioner at all times thereafter

was entitled to the benefit of, and subject to, Montana State law. The warranty deed of *October 6, 1955,* which petitioner now seeks to vitiate was executed by petitioner (and her husband never made a party to this action) *subsequent to* the vesting and acquisition of such rights of property and citizenship.

It is unnecessary in this case to determine whether or not that deed was valid, because in any event in the 14½ years between the execution and delivery of the deed on *October 6, 1955,* and the commencement of this action on *June 20, 1970,* respondents acquired title under Montana law by adverse possession, and petitioner in addition is barred by Montana State Statutes of Limitation.

Where is there any statutory or case law authority to the contrary on comparable facts?

STATEMENT

In *1889* Congress provided in Montana's Enabling Act that the jurisdiction of the United States over Indian land would terminate when the title of the United States was extinguished.

In *1906* Congress amended the General Allotment Act of *1887* by what is now *25 U.S.C. 349.* The Secretary of Interior was authorized to issue to an Indian allottee a patent in fee simple whenever, in his discretion, he deemed the Indian allottee to be competent and and capable of managing his or her affairs. The stat-

ute provided that upon issue of the patent in fee the title of the United States was thereby extinguished, and the competent Indian allottee was immediately vested with the rights of property and citizenship described above under question No. 3. In *1916*, in two decisions, this Court construed *25 U.S.C. 349*, and gave full force and effect to the Congressional intent.

The legislative history preceding the passage of the Crow Allotment Act of *June 4, 1920*, reflects that between *1906* and *1920 a* substantial percentage of the Crow Reservation adult Indian population had already been declared competent under *25 U.S.C. 349*; had already received patents in fee thereunder; the fee title of the United States had been divested; and each such competent Crow Indian patentee had already been vested with the rights of property and citizenship provided by the statute (See *Appendix A*). In addition this Court construed the intent of that statute in two decisions in *1916*. Backed by those facts, Congress provided in *Section 1* on *June 4, 1920*, that the allotments would be evidenced by patents in fee to competent Indians, but by trust patents to minors and incompetents of the legal force of the General Allotment Act. It did not specify the legal force and effect of a patent in fee. There was no need. Such had already been provided in the language of *25 U.S.C. 349*, in the holdings by this Court in the two decisions in *1916*, and by the prior granting of all such rights to a substantial proportion of the adult

Indians in the Crow Reservation. Careful study of the legislative history preceding the *1920* Act indicates that it was the Congressional intent to continue to give the same rights to competent Indians receiving patents in fee under the provisions of *Section 1* of the Act of *June 4, 1920.*

In any event, if there was any doubt, Congress removed that doubt when it amended *Section 1* in *1926.* The Congressional purpose was to clarify in the minds of the Indians that their trust patents would not only have the legal force and effect of the *Act of 1887,* but that they would have the legal force and effect of that statute and *all amendments thereof up to 1926* (See *Appendix C*). Congress purposely and intentionally incorporated in *Section 1* on *May 26, 1926,* that Crow Allotment patents thereafter would have the legal force and effect of *25 U.S.C. 349.* This Court so held in *1939* in the *Powers* case discussed later.

After a thorough, exhaustive, administrative investigation in which nongovernmental respondents played no part, patent in fee issued to petitioner, a competent adult Crow Indian, on *September 15, 1955.* Upon that date by reason of the issue of the patent in fee, petitioner acquired all rights under the express provisions of *25 U.S.C 349* incorporated in *Section 1* of the Crow Act. of *May 26, 1926,* as construed by this Supreme Court.

The patent in fee has never been set aside. There are no facts that would warrant even the United States to request it be set aside. It still stands as a valid, subsisting, governmental patent in fee.

There is no statutory nor case authority that authorizes the petitioner to individually assume and exercise the sovereign prerogatives of the United States, and to collaterally attack and set aside a governmental patent in fee, nor change the provisions of the statute under which it was issued.

There is no statutory nor case authority authorizing the petitioner to directly, or indirectly, in a collateral action such as this one, to mandamus the United States to directly attack the validity of a patent in fee.

October 6, 1955, subsequent to the issue and delivery of the patent in fee, petitioner *and her husband* executed and delivered the warranty deed which petitioner 14½ years later as of *June 20, 1970,* now seeks to set aside. The deed was duly recorded in Montana State recording offices on *October 14, 1955.* Petitioner has admitted that from that date on state officials have levied, assessed, and collected from nongovernmental respondents all state property taxes; that with the initial acquiescence, consent, and subsequent actual knowledge of petitioner, nongovernmental respondents entered upon and occupied the land under that warranty deed, have claimed title thereunder, and have occupied and used the lands for the normal use capabilities of the land.

It was not until more than 14½ years later that petitioner on *June 20, 1970,* commenced this action to collaterally attack and set aside the patent in fee; to vitiate the deed; and to recover the land.

Respondents believe the warranty deed of *October 6, 1955,* was and is a valid, legal conveyance. It is unnecessary to determine that issue in this case. With the patent in fee simple issued to petitioner on *September 25, 1955,* still valid, and subsisting, fee title then vested in petitioner; the legal title of the United States was and is extinguished; all restrictions on sale, incumbrance and taxation were removed; petitioner's property rights thereafter were governed by Montana law. Under Montana law the nongovernmental respondents are the legal owners of the property.

ARGUMENT AND LEGAL AUTHORITY

February 22, 1889, 25 Stat. 676, Congress provided in the Montana Enabling Act that individual or tribal Indian lands within Montana would remain subject to the disposition of the United States "until the title thereto shall have been extinguished by the United States."

By the General Allotment Act of *1887* as amended *May 8, 1906, 24 Stat. 182, 25 U.S.C. 349,* Congress provided that whenever the Secretary of Interior, in his discretion, is satisfied that an Indian is competent and capable of managing his or her affairs, the Secretary may cause to be issued to such allottee a patent in fee

simple, and the allottee thereby acquires the rights of citizenship and property spelled out in the statute. The legal effect of a patent in fee simple issued to a competent Indian allottee was construed and spelled out in *1916* prior to the Crow Allotment Act of *1920* by two decisions of this Court:

> *Dickson v. Luck Land Company, 1916, 242 U.S. 371, 37 S.Ct. 167, 61 L.Ed. 371;*
>
> *United States v. Waller, 1916, 243 U.S. 452, 37 S.Ct. 430, 61 L.Ed. 483.*

The legislative history of the *Crow Act of 1920* discloses that a substantial percentage of the Adult Indian population of the Crow reservation had already been adjudged competent, had already received patents in fee simple between *1906* and *1920,* and were already vested with the citizenship and property rights provided by this *1906* statute (*25 U.S.C. 349*) when the Crow Act was promulgated on *June 4, 1920.* (See *Appendix A, pp. 16, pp. 39-40*)

The earliest legislative hearings pertinent are the House Hearings of *November 9, 1919* (See *Appendix A*). The Crow Act which had passed the Senate on *October 23, 1919,* is set out at *pages 43-47* of that Report, and contains the same controlling language in both *Sections 1* and *2* that persisted all through the legislative proceedings until the amendment of *Section 1* on *May 26, 1926.* Allotments were to be evidenced by patents in fee to competent Indians, but by trust patents to mi-

nors and incompetents of the legal effect of the Act of *1887*. There was no need to spell out the legal force and effect of a patent in fee to a competent Indian in *Section 1* of the Act of *1920*. Such was spelled out in unambiguous language in *1906* in the general law *25 U.S.C. 349*; that statute had been twice construed by this Court in *1916;* a substantial proportion of the competent adult Crows had already received patents in fee under *25 U.S.C. 349,* and vested with the rights therein provided.

The legislative history subsequent to those Hearings of *November 5, 1919,* does not suggest any different Congressional intent. House Hearings occurred on *March 19, 20, 1919,* and take up 112 pages in which they discuss various changes in various sections. The The only discussion with respect to *Section 1* appears in *pages 1* through *8*. The only changes suggested were changes in the geographical location of lands desired reserved for the tribe and lands desired open for allotment, nothing else. More than *90* pages were devoted to *Section 2,* and the intention of Congress to protect the noncompetent, trust allottee, Indian lessors from forced sales of their leased trust lands to the large acreage lessors of those trust lands. No changes were made in the controlling language which had passed the Senate on *October 23, 1919.* Not one single, solitary word in that 90-page discussion of *Section 2* refers to competent Indians, or patents in fee, nor to altering or changing

those rights inherent in the provisions of *Section 1* that allotments would be evidenced by patents in fee to competent Indians. The fact that the matter of competency, and the legal force and effect of a patent in fee to a competent Indian, were never mentioned nor discussed nor touched upon in any of the discussions pertaining to *Section 2* in those *Hearings of March 19, 20, 1920,* makes all the more significant the subsequent legislative history where Congress did discuss what was intended for the competent Indians receiving patents in fee.

After the Committee Hearings, and after the Bill was finalized by Committees, it was reported out of Committee to Congress, and the purpose and intent of Congress with respect to the rights of competent Indians receiving a patent in fee stands out like a sore thumb (See excerpts in *Appendix B*). Careful analysis of this legislative history in its entirety suggests a clean cut intent by Congress in *Section 1* of the Act of *June 4, 1920,* to authorize the issue of patents in fee to competent Indians, and that such would be governed by the provisions of *25 U.S.C. 349.*

Is it a credible conclusion in face of all the overwhelming evidence to the contrary that Congress would create such a potential hot bed of havoc, friction, and dissatisfaction on the same reservation by giving half of the competent Crow Indians receiving patents in fee unrestricted rights of property and citizenship between *1906* and *1920,* and then turn around in *1920* and take

them away from the other half possessing all the same, identical qualifications for such rights? Any doubt was necessarily removed in *1926*.

Congress on *May 26, 1926,* amended *Section 1* of the Crow Act of *1920* by *44 Stat. 658* to provide expressly that allotments would be evidenced by patents in fee to competent Indians, but by trust patents to minors and incompetents which trust patents shall have the legal force and effect of the General Allotment Act of 1887, *"as amended."* The purpose specifically stated in both House Committee Report and Senate Committee Report was:

> "This bill contemplates amending sections 1, 5, 6, 8, and 18 of an act approved *June 4, 1920* (41 Stat. L. 751-757), affecting rights of the Crow Tribe of Indians of Montana.
>
> The first change in section 1 of the act appears in line 5 of page 3, where the words, 'as amended' have been added for the purpose of clarifying in the minds of the Indians that the trust patents issued in pursuance thereto shall have the force and legal effect as prescribed by the act known as the 'General Allotment Act' of *February 8, 1887,* as amended up to the present. The addition of these two words will not in any way affect existing law. * * * *" (*See Appendix C*)

Furthermore, Courts accept the fact that Congress was fully aware of the meaning of the language employed, of the prior construction of the incorporated statute by this Supreme Court in *1916,* and that when Congress in *1926* provided expressly that the legal force and effect of trust patents would be as provided in *25*

U.S.C. 349, Congress knew and intended to incorporate the prior construction of the statute by this Court.

Shapiro v. United States, 1948, 335 U.S. 1, 68 S.Ct. 1375, 92 L.Ed 1787;

Engel v. Davenport, 1926, 271 U.S. 33, 46 S.Ct. 410, 70 L.Ed. 813;

Inhabitants of Montclair v. Ramsdell, 1883, 107 U.S. 147 at 152, 2 S.Ct. 391 at 395, 27 L.Ed. 431;

United States v. Menasche, 1955, 348 U.S. 528, 75 S.Ct. 513, 99 L.Ed. 615; and

Mercantile National Bank at Dallas v. Longdean, 1963, 371 U.S. 555, 83 S.Ct. 520, 9 L.Ed. 2d 523.

In two decisions subsequent to *1926*, this Court adhered to the same construction of *25 U.S.C. 349* with respect to the legal force and effect of a patent in fee to a competent Indian as this Court had previously rendered in the two decisions in *1916.*

Larkin v. Paugh, 1928, 276 U.S. 431, 48 S.Ct. 366 72 L.Ed. 640; and

United States v. Powers, 1939, 305 U.S. 527, 59 S.Ct. 344, 83 L.Ed. 330; involving patents in fee and subsequent conveyances on the Crow Reservation;

In the *1939* decision, the *Powers* case, patents in fee had issued to competent Crow Indians both before *1920* and after *1926.* Subsequent to the issue of those patents in fee, the competent Indian patentees had sold their patented land, the facts of this case, and to some of the same respondents in the case. The specific issue involved was the nature and extent of the fee simple title arising out of the patent in fee by reason of *25*

U.S.C. 349, and whether or not water rights accompanied those subsequent conveyances as an incidence of the fee simple title.

See also:

Bonds v. Sherburne Mercantile Co., 1948, Mont., 9th C.C., 169 F.2d 433, cert. den 69 S.Ct. 294;

Montana Power v. Rochester, 1942, Mont. 9th C.C. 127 F.2d 189.

Trust patents issued to petitioner on *October 10, 1923* (*T79*), and *January 26, 1924* (*T80*).

December 31, 1948, petitioner, then an adult, applied for a declaration of competency (*T135*); such was recommended by the Statutory Committee on *January 20, 1949* (*T137*); and was officially announced *April 12, 1949,* by the Department of Interior (*T138*).

October 26, 1949, petitioner applied for authority to sell her land (*T139*). The same reason was given as petitioner gave more than five (5) years later when she applied for a patent in fee.

> "My reasons for making application for the sale of the above-described land are:
>
> This land is hill land which is located in a remote area. I want to sell this land and buy other land closer to my husband's land, by doing this it will be an advantage to us. Money can be held as a trust fund and used as proposed."

February 25, 1955, petitioner applied for the issue of a patent in fee (*T120-124*). Note the title:

"APPLICATION FOR A PATENT IN FEE
(Act of May 8, 1906, 34 Stat. 182)"

Note the same reasons previously given in *1949*:

"(e) Set forth fully reasons for requesting a patent in fee, including your plan for use of the proceeds of the sale, if you intend to sell the land. (Use extra sheet, if necessary):

My husband and I run a sheep ranch. My allotment is too far away from the ranch to use. I want to sell my land and use the money to buy some land near our place at Wyola and also to buy some more sheep.

6. I understand that if my application is granted and a fee patent is issued to me, the land will become unrestricted and subject to taxation from the date of issuance of the patent in fee.

I hereby certify that the above is true to the best of my knowledge."

Phoebe Wilson Dillon

(Applicant's signature)

Witnesses to Signature:

DeWitt A. Dillon (T123)

The ability of petitioner to fully understand the effect of her application for the patent in fee, and particularly *No. 6* immediately above her signature, is well revealed by the mute evidence from her own statements of her business success after she was declared competent in *1949*, and the fact that she was an educated woman with an excellent vocabulary and easy command of the English language so readily perceived in the *1932* personal handwritten letter by petitioner from the Flandreau Indian School in South Dakota (*T81-83*); and the two subsequent handwritten letters in *1945* to the Superintendent (*T85-88*).

Also standing out vividly in the record is the nature and extent of the undisputed careful, thorough, painstaking administrative investigation by all departments of the Bureau of Indian Affairs of petitioner's application for patent in fee (*T120-134*), with reasons given by the Superintendent at (*T134*). All reasons and answers given in the application were found to be true and factually sound. There is no evidence and no claim that any agent, servant, or employee of the nongovernmental respondents ever took part in, nor influenced, nor attempted to influence in any way, either the official investigation or the resulting official decision. There is no factual or legal basis to set aside this patent in fee even in a direct attack.

The only false answer in the petition (if it was in fact false) was the answer to 5(c) at *T122*:

"5. General Information:

Have you been asked to procure a patent in fee? *No.*"

Petitioner claims the deceased Matt Tschirgi requested her to apply for the patent in fee (Tschirgi was already deceased when petitioner so stated). If true, this is certainly not the kind nor quantity nor quality of evidence which this Court would require before it would permit even the Government to set aside the patent in fee in a proper direct attack.

May 21, 1955, there was a land agreement between Petitioner and Matt Tschirgi for Antler Land Com-

pany. The Court should note these factual differences between this agreement, and the warranty deed of *October 6, 1955,* which petitioner seeks to vitiate. They were and are very different contracts. The Court will note the agreement was executed by petitioner alone. Her husband who did join in executing the subsequent warranty deed (but who is not a party to this action) was not a party to this prior agreement. This agreement includes the *NW¼ of Section 26* never included in the subsequent warranty deed. This agreement does not include any land in *Section 36* which was later included in the subsequent patent in fee and the subsequent warranty deed (*T11, 12, 101*). They are different contracts. Furthermore, this agreement was never recorded any place; there was never any effort to specifically enforce this agreement; the nongovernmental defendants have never claimed any rights arising out of this agreement; the nongovernmental defendants have never occupied, used, nor claimed the lands thereunder; and no taxes were ever levied, assessed, or collected by reason of it.

September 15, 1955, following a thorough, exhaustive, administrative investigation of the application, a patent in fee simple issued to petitioner (*T101*). Note the language long recognized by all Courts as a conveyance of an unrestricted fee simple title.

> "NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, HAS GIVEN AND GRANTED and by these presents DOES GIVE AND GRANT, unto the said claimant and to the heirs of the said claimant

> the Land above described; TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereto belonging, unto the said claimant and to the heirs and assigns of the said claimant forever. The land covered by this patent is not liable for any debt contracted prior to this date, as provided by *Section 5* of the Act *of February 8, 1877* (*24 Stat., 388, 389*), and the amendatory Acts of *May 8, 1906* (*34 Stat., 182*) and *June 21, 1906* (*34 Stat. 325, 327*).

Upon issue of the patent in fee all title of the United States except such as was expressly excepted and reserved terminated; no one including the petitioner could collaterally assail the validity of the patent; assuming but not conceding facts so warranting, only the United States in a direct action can utilize the Courts to set the patent aside.

> *Burke v. S.P., 1913, 234 U.S. 669, 34 S.Ct. 907, 58 L.Ed. 1527;*
>
> *Moore v. Robbins, 1877, 96 U.S. 530;*
>
> *N.P. v. McComas, 1919, 250 U.S. 387, 39 S.Ct. 546, 63 L.Ed. 1049;*
>
> *Steel v. S. Louis Smelting & Refining Co., 1882, 106 U.S. 447, 1 S.Ct. 389, 27 L.Ed. 226.*

Whether or not the United States shall or shall not attempt to set any patent aside is a sovereign prerogative of the United States to decide, acting through its Attorney General. Neither the petitioner nor the Courts can assume that sovereign prerogative, nor directly nor indirectly mandamus the United States to do so.

White v. Administrator of General Services, 1965, 9th C.C., 343 F.2d 444;

Smith v. United States, 1967, 5th C.C., 375 F.2d 243;

Southport Land et al, v. Udall, 1965, Calif., S.D. 244 F.Supp. 172; and

Parker v. Kennedy, 1963, S.D. NY 212 F. Supp. 594.

Crucial controlling facts wholly ignored by petitioner are that the patent in fee of *September 19, 1955,* remains to this date undisturbed as a valid, binding, and subsisting governmental patent, and that all citizenship and property rights vested in petitioner by reason thereof are those determined by the provisions of *25 U.S.C. 349* which Congress expressly provided to be the controlling law in *Section 1* as amended in 1926. The title of the United States was extinguished when the patent issued on *September 15, 1955.* All restrictions on sale, incumbrance or taxation were removed from the land. Petitioner thereafter was a citizen of the United States with all privileges and immunities, entitled to the benefit of, and subject to, Montana Law. Petitioner simply cannot collaterally attack or set that patent aside, nor collaterally change the statutory rights arising from it; and cannot directly nor indirectly mandamas the United States to do so in this collateral attack.

October 6, 1955, petitioner and her husband jointly made, executed, and delivered the warranty deed attacked by petitioner (*T12*). Again we note that this is

a substantially different contract than the agreement of *May 21, 1955.* (See Brief above pp. 18-19)

As disclosed by the affidavit of R. F. Hibbs (*T258-261*), and by admissions of petitioner in response to requests for admission of facts 1 through 10 (*T69-72*); admitted by Response I (*T247*), at all times from the recording of the warranty deed on *October 14, 1955,* proper state officials levied, assessed, and collected from nongovernmental respondents all state property taxes on the land. At all times since the deed the nongovernmental respondents with actual knowledge of petitioner have openly and notoriously claimed title under the deed, and have occupied, and used the lands for their customary land use capability.

The District Court and Circuit Court were clearly correct in holding petitioner barred from recovery under Montana law. All state statutes are from the *Revised Codes of Montana, 1947* and amendments to date.

(1) Appellant is Barred by State Statutes of Limitation.

For the purposes of limitation, the action is deemed commenced by the filing of the complaint on *June 20, 1970* (*93-2401*).

a. Plaintiff was neither seized nor possessed of the property within five (5) years before the commencement of the action (*93-2504* and *93-2505, R.C.M.*).

b. Actions for relief on the ground of fraud or mistake must be commenced within two years of the dis-

covery by the aggrieved party of the facts constituting the fraud or mistake (*93-2607(4) R.C.M.*).

Montana rules applicable in fraud cases are set out clearly in *Falls Land and Gravel Co. v. Western Concrete, Inc., 1967, D.C. Mont. 270 F.Supp. 495.*

(2) Respondents Have Acquired Title By Adverse Possession.

In Montana, the deed, even if it was void, is color of title. The combination of color of title plus user and payment of taxes for the statutory period suffices.

Even without color of title, however, title can be acquired by prescription where as here there was known adverse and notorious occupation, possession and user adversely for the statutory period, coupled with payment of taxes.

93-2507, R.C.M. through *93-2513, R.C.M.;*

Baum v. N.P., 1918, 55 Mont. 219, 175 Pac. 872;

Berger v. Johnson, 1944, 116 Mont. 270, 151 P.2d 586;

Fitschen Bros. Commercial Co. v. Noyes, 1926, 76 Mont. 175, 246 Pac. 773, which carefully differentiates prescription and adverse possession; and which holds that the validity or invalidity of the deed does not preclude the fact that it is good 'color of title'; and

Hentzy v. Mandan Loan & Inv. Co., et al, 1955, 129 Mont. 324, 286 P.2d 325.

(3) Privileges and Immunities, Due Process, and Equal Protection Clauses of United States Constitution.

To deprive the present owners of their property

would be a violation of the law of eminent domain, a taking of property without due process of law, a denial of the rights of both petitioner and respondents under the privilege and immunities clause, the due process clause, and the equal protection of the law clause, of the U.S. Constitution. See *U.S. Constitution, Article IV, 2; Amendment 5;* and *Amendment 14.*

It would unduly extend this brief to individually analyze and negate each of the case decisions relied upon by petitioner. Each has the same fatal defect. They simply do not involve the same controlling facts that exist in this case, nor the same granting Indian legislation. For example, these tribes are expressly excepted from the provisions of *25 U.S.C. 349*—Cherokees; Creeks, Choctaws, Chickasaws; Seminoles; Osage; Miamies; Peorias; Sacs and Foxes; Seneca Nation; *(Title 28 U.S.C. 339)*; plus the Five Civilized Tribes in Oklahoma (*Title 28 U.S.C. 353*). Cases cited by petitioner derive from many of these tribes. Each one involves the legal validity of conveyances by noncompetent Indians *before* a patent in fee issued, and while the legal title *still vested in the United States* in trust for noncompetent Indian allottee. Not a single one of those cases involved the facts before the Court in this case—an administrative adjudication of competency; the issue of a patent in fee which extinguished the title of the United States and removed all restrictions on sale, incumbrance or taxation from the lands; and which vested specific and express

rights of citizenship and property in petitioner. In this case, the conveyance was *after* the adjudication of competency; *after* the issue and delivery of the patent in fee; *after* the title of the United States had been extinguished; *after* the restrictions had been removed; and *after* petitioner was subjected to Montana State Law. The situation is succinctly summarized by the Ninth Circuit Court:

> Appellant's argument and authorities on this issue consistently represent the natural concern of Congress and the Courts to protect Indians in the possession, enjoyment and authorized conveyance of restricted lands, but the acreage here involved falls outside that category. It is the subject of a patent in fee, the effect of which was to remove restrictions on its alienation and provide that the allottee should have the benefit of and be subject to the laws of the State of Montana.

CONCLUSION

We respectfully submit the Petition for Writ of Certiorari should be denied for these reasons:

1. The decision of the Ninth Circuit Court is wholly consistent with prior decisions of this Court considering analogous facts. The petition does not present the factual and legal conditions precedent required in Supreme Court *Rule 19(1)(b)*.

2. Petitioner cannot collaterally attack the patent in fee issued *September 15, 1955*, by the United States Government, nor collaterally change the provisions of the statute *25 U.S.C. 349* under which it was issued.

3. Petitioner cannot collaterally in this action mandamus the United States to exercise its sovereign prerogative of deciding whether or not the United States should attack the validity of the patent.

4. As long as that patent in fee of *September 15, 1955,* remains outstanding the title of the United States remains extinguished; all restrictions on sale, incumbrance or taxation were and are removed; and petitioner ever since has been, and now is, entitled to the benefit of, and subject to Montana State Law.

5. It is immaterial whether or not the warranty deed of *October 6, 1955,* was valid when executed and delivered. Nongovernmental respondents firmly believe it was. However, nongovernmental respondents in any event have acquired title under applicable Montana Law through adverse possession, and petitioner is barred by Montana Statutes of Limitation.

Respectfully submitted,

CALE CROWLEY
500 Electric Building
Billings, Montana 59101

R. F. HIBBS
Mutual Benefit Life Building
Billings, Montana 59101

APPENDIX

3. Petitioner cannot collaterally in this action mandamus the United States to exercise its sovereign prerogative of deciding whether or not the United States should attack the validity of the patent.

4. As long as that patent in fee of September 15, 1953, remains outstanding the title of the United States remains extinguished; all reservations of title, interest or encumbrance and all reservations and patents ever since has been and now is entitled to the benefit of and subject to Montana State Law.

5. It is immaterial whether or not the warranty deed of October 6, 1953 was executed and delivered. Nongovernmental respondents firmly believe it was. However, nongovernmental respondents in any event have acquired title under applicable Montana Law through adverse possession, and petitioner is barred by Montana Statutes of Limitation.

Respectfully submitted,

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INDEX OF APPENDIX

Appendix A

Excerpts from *November 5, 1919,* Hearings before a Subcommittee on Indian Affairs, House of Representatives, entitled "Indian Tribes of Montana."

Appendix B

Excerpts from page of House Congressional Record of *April 2, 1920.*

Appendix C

Senate Committee Reporter *No. 639* of *April 19, 1926, Calendar 635,* which incorporates House Report *228.*

APPENDIX A

INDIAN TRIBES OF MONTANA

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE COMMITTEE ON INDIAN AFFAIRS

HOUSE OF REPRESENTATIVES

SIXTY-SIXTH CONGRESS

FIRST SESSION

NOVEMBER 5, 1919

I. (Pp. 12-13)

12 INDIAN TRIBES OF MONTANA

* * * *

MR. RHODES. Well, gentlemen, that brings us to the consideration of H. R. 9709, introduced by Mr. Riddick, which provides for

the allotment of certain lands of the Crow Tribe, for the distribution of tribal funds, and for other purposes.

MR. HAYDEN. May I ask if a similar bill has passed the Senate

MR. RIDDICK. Yes, this exact bill passed the Senate. In fact, I introduced some time ago a bill providing substantially for what this bill provides for, and after that bill had been looked over in the Senate Committee and a bill agreed upon unanimously by the Indians, by the department, by the people of Montana, and by the members of the committee, then I introduced the same bill. I changed my bill and introduced a new bill.

MR. HASTINGS. You say this bill passed the Senate?

MR. RIDDICK. Yes.

MR. HASTINGS. What is the number of the Senate bill?

MR. MERITT. Senate 2890.

MR. RHODES. We have not that here.

MR. HASTINGS. Yes, we have.

MR. HAYDEN. Mr. Chairman, we will not report anything out of this committee except Senate 2890,

which has passed the Senate, so we might as well work on that bill from the beginning.

MR. RHODES. I think so.

MR. HASTINGS. It passed the Senate on October 23d.

MR. RHODES. Suppose, then, we let Mr. Ridick proceed with the Senate bill. You may proceed, Mr. Riddick.

II. (Pp. 16-17)

16 INDIAN TRIBES OF MONTANA

* * * *

MR. HASTINGS. Let me ask Mr. Merrit, if you will pardon me, about how many Indians are in the Crow Tribe?

MR. MERITT. One thousand seven hundred.

MR. HASTINGS. About how many of these speak English?

MR. MERITT. About 50 per cent.

MR. HASTINGS. Have any of them been adjudged competent?

MR. MERITT. Yes, sir.

MR. HASTINGS. About how many?

MR. MERITT. I think there are about 200 Indians on the Crow Reservation who have patents in fee —between 200 and 300 Indians.

MR. HASTINGS. That is a small per cent.

MR. RIDDICK. One thousand seven hundred takes in the infants as well as the adults. That is a large percentage of the adults, is it not.

MR. HASTINGS. Those 200 are all adults, of course?

MR. MERITT. Yes, sir.

MR. HASTINGS. About how many adults are there of the 1,700, Mr. Riddick? Are some of these educated and good business men?

MR. RIDDICK. Yes, indeed; yes sir.

MR. HASTINGS. Competent?

MR. RIDDICK. Yes, sir.

MR. HASTINGS. Patents have been issued to them?

MR. RIDDICK. Yes, sir.

MR. HASTINGS. And this is their property?

MR. RIDDICK. Yes, sir.

MR. HASTINGS. They are citizens of the United States?

MR. RIDDICK. I can not tell whether they are or not.

MR. HASTINGS. Are they allowed to vote?

MR. RIDDICK. I think not.

MR. MERITT. Some of them are citizens, and some are not.

MR. HASTINGS. They are when a patent is issued?

MR. MERITT. Yes, sir.

MR. RHODES. All those to whom fee patents have been issued are citizens of the United States, are they not?

MR. MERITT. Yes, sir.

III. (Pp. 39-40)

INDIAN TRIBES OF MONTANA 39

* * * *

MR. MERITT. Secretary Lane prefers that the bill should be amended so far as it relates to the power site on the Crow Reservation.

MR. HASTINGS. Well, that is section 10 we had up. (Pertaining to power sites)

MR. MERITT. Yes, sir.

MR. HASTINGS. Well, you have heard the amendment I suggested, to the effect that they be approved by the Secretary of the Interior; what do you say about that?

MR. MERITT. The Secretary, of course, would prefer that the power be vested in the department rather than have the power vested in the tribal council, to determine the action that it might want to take.

MR. HASTINGS. Then, you take away all initiative from the Indian and from the council, no matter how many competent Indians there may be or how many competent Indians had passed on this matter, is that the department's view of it?

MR. MERITT. The department would prefer that the provision in the water-power bill should govern in leasing this power site, rather than to have an exception made in the provisions in this Crow bill.

MR. HASTINGS. Well, if we pass it, this Crow bill now, and if we passed the other one, it would appear that this would conflict with it. If we have some legislation in the water-power bill which is not yet passed—it has passed the House, but has not passed the Senate—if this passed, if we had a law, and then a subsequent law was passed which conflicted with it, it would repeal it to that extent.

MR. MERITT. I believe that, as a matter of law, if the general water bill should pass after this legislation has passed, that this would be considered as special legislation applicable to the Crow Reservation, and, therefore, the general water-power bill would not apply.

MR. HAYDEN. Let's get the facts about this water-power site. In the first place, I suppose there are about a thousand adult Indians of the Crow Tribe, of whom 200 are competent?

MR. MERITT. Between 200 and 300 have already been declared competent, and probably others will be declared competent.

MR. HASTINGS. How many are there?

MR. HAYDEN. About 1,000 adults—

MR. MERITT. I think there are considerably fewer than 1,000 adults.

MR. HAYDEN. Anyhow, a majority of the adult members of the Crow Tribe are incompetent.

MR. HASTINGS. I think that is important. He says about 200 are competent. Now, I want to know how many adults are incompetent, so that we can get at this proposition. There is a big difference between 200 and 400 or 500 or 600 out of 1,700.

MR. MERITT. There are 1,703 Indians on the Crow Reservation, and 407 of them are of school age.

Now, the paper before me does not give the number of Indians who are adults and who are minors.

MR. HASTINGS. Well, anyway, we can approximate it. The nearest approximation is that the Indians will consist of about one-fifth of the area of land affected by this water-power site, and that the Federal Government, through its ownership of public lands and public owners will be interested in the other four-fifths. Therefore, there is a danger that a majority of the Indians of this tribe are incompetent—and the Indians of this trible would have the control of the disposition of

a water-power site, in which they have but a 20 per cent interest. Now, under those exceptional circumstances, it seem to me that the Secretary of the Interior could be given full authority to dispose of this matter, which would not be true if the entire project belonged to a tribe of Indians, a majority of whom were competent. Now, what does the general law provide, so far as it affects the Indians; how does it affect the individual Indian, and how does it affect the white man; how does the general law affect them?

MR. HAYDEN. If private property is taken for public use, for the erection of a dam, or an irrigation project, or where land is inundated by the construction of a reservoir, the Government, in constructing the project, or the lessee, would have to compensate the private land owner for the value of his propery, either by agreement between them, or else the damage would be fixed by condemnation proceedings in court.

MR. HASTINGS. Now, suppose that some of the competent Indians had been allotted land which would be affected?

MR. HAYDEN. If such Indians are citizens of the United States, they would be treated exactly the same as white men. They would either have to agree upon the value of the property taken from them, or else it would have to be determined by condemnation proceedings. There is no question about that.

APPENDIX B

CONGRESSIONAL RECORD—HOUSE

1920 April 22 5999

* * * *

MR. RHODES. Mr. Chairman, I yield eight minutes to the gentleman from Montana (Mr. Riddick), the author of the bill..

MR. RIDDICK. Mr. Chairman, S. 2890 as amended by the House Indian Committee is substantially the bill I introduced as H. R. 9709. It provides for the allotment of lands and other property belonging to the Crow Indian Tribe in Montana.

The Crow Indian Reservation is in the southeastern part of Montana. It is a small empire in extent, being nearly four times the size of the State of Rhode Island. It is a historic spot, the scene of Custer's last stand. It is a beautiful country with snow-capped mountains, picturesque valleys, and rolling plains. Its soil is fertile and it is well watered with mountain streams. Its grasses are so plentiful and so nutritious that the cattle which feed there are reported to be the finest grass-fed cattle that reaches the Chicago market. This vast and rich territory, comprising nearly 2,000,000 acres, is occupied and owned in common by the 300 Indian families who reside there. There are about 1,700 of these Indians, all told, including adults and children.

In addition to owning this land in common there is also a tribal herd of cattle numbering more than 15,000 head. There is money in the bank belonging to this tribe of Indians amounting to over a quarter of a million dollars.

These Indians are held as wards of the United States Government, and their business is looked after for them under the direction of the Commissioner of Indian Affairs, in the Department of the Interior.

Although this tribe of Indians is possessed of great wealth, if one would visit this reservation one would see little evidence of prosperity or comfort. The Indians, most of them, live in poorly constructed shacks. They spend a great deal of their time in idleness or play, there being little individual incentive to go to work, and the population is decreasing.

A great many of these Indians are competent to look after their own personal and business affairs. They have had the privilege of years of schooling and of commingling with their white brothers in cities and towns and among neighborhood ranches.

Some of these Indians have great wealth in their own right. Some are among the best-educated Indians in the country. The Indians are all dissatisfied with the present arrangement. For many years they have held frequent council meetings and have decided that they want to each own his own property in his own right. They do not want to longer be wards of the Government. They desire full citizenship and to stand on their own resources as soon as they are able to do so.

The simple purpose of this bill is to equitably divide this land and this other property, held in common by the tribe, and to give to each Indian his individual share, and to determine what Indians are fully capable of administering their own affairs. The bill provides that those who are competent shall be placed upon their own resources and be given all their property and all the rights and privileges of citizenship under proper safeguards. It also provides for those not yet fully competent, and that these may as rapidly as possible be made independent of the guardianship exercised over them by the United States Government, and be given that individual responsibility which is the ultimate achievement aimed at in the proper settlement of what is known as the Indian problem. This has been the wise and consistent policy of Congress in the past.

In the opinion of the Indian Committee, which recommends the passage of this bill, the Crow Indians

have now reached a position where the ownership of their land and their property can be safely intrusted to them.

Exhaustive hearings have been given on this bill, both by the Senate Indian Committee and by the House Indian Committee.

Delegates of the Crow Indian tribe have been present at these committee meetings and are now here in Washington, and are unanimous in expressing the earnest desire that the Congress shall pass this bill in its present form as promptly as possible.

Ex-Secretary Lane, who was Secretary of the Interior when the hearings were begun upon this measure,

CONGRESSIONAL RECORD—HOUSE
6000 April 22,

asked that a certain amendment recommended by him should be incorporated in the bill, and with this change recommended its passage. This amendment recommended by Secretary Lane is one of the committee amendments now incorporated in the bill. Every member of the Indian Committee favors the passage of this bill. The Indian Department has cooperated with the Indian Committees of both the Senate and the House and the Crow delegates from the Crow council, and all have agreed upon the bill in its present form and recommend its passage.

* * * *

CONGRESSIONAL RECORD—HOUSE
6006 April 22,

* * * *

THE CHAIRMAN. Yes. Two minutes of the time remain.

MR. RHODES. Mr. Chairman, if the commit-

tee will permit. I desire to make a brief statement during this two-minute period.

In the first place, I am a member of no committee that has devoted as much time to the consideration of any one bill of this character as has been devoted to the bill under consideration. In the first place, both the Senators from the State of Montana appeared before the committee last October urging this legislation. The bill had already passed the Senate, and the House Committee on Indian Affairs, after having listened to a number of Indians from the reservation, decided to report the bill with certain amendments. The bill went upon the calendar, and after remaining there some time objection arose to the bill on the part of certain Indians on the reservation. Those Indians sent a delegation to Washington, and the chairman of our committee accorded that delegation an additional hearing. As the result of that hearing, the chairman of the committee withdrew the bill. The committee again considered the bill and reported it unanimously with the amendments agreed upon, which have been printed as a part of the bill now before the committee.

I desire to say, too, Mr. Chairman, that this is a very important piece of legislation, because the bill, if the committee understands the true situation, has the approval of the Crow Indians, and these Indians have reached that condition of progress and development when they should have turned over to them their property and be allowed to administer their own affairs.

* * * *

CONGRESSIONAL RECORD—HOUSE
6010 April 22,

* * * *

The Clerk read as follows: (Reading all of Section 6 pertaining to mineral ownership and leasing not in itself pertinent to this case.)

MR. WALSH. Mr. Chairman, I do not know the reasons which prompted the committee in reducing this term to 25 years, but it seems to me it would be an *unwise* thing to do. I would like to hear from the gentleman in charge of the measure.

* * * *

MR. RIDDICK. Mr. Chairman, will the gentleman yield

MR. WALSH. Certainly.

MR. RIDDICK. I think the observations of the gentleman from Massachusetts would be well taken if it were not for the fact that when these patents are issued in 25 years they will be issued in trust for the Indians if the Indians are not fully competent. On page 3, line 12, there is a provision dividing the Indians into competent and incompetent Indians, and only the competent are given the right to look after their own property.

MR. WALSH. This language is broader than that, and does not, I think, come within that requirement. It says "that at the expiration of 50 years from the date of approval of this act the coal, oil, gas, or other mineral deposits upon or beneath the surface of said allotted lands shall become the property of the individual allottee or his heirs." That means that at the expiration of that time whatever valuable deposits there are in that land shall belong to the individual Indians, irrespective of the issuance of any trust patents or by means of any trust patents.

MR. RIDDICK. This land will belong to the Indians, but the incompetent Indians will be subject to the Indian Department, just as they are now.

APPENDIX C

(Senate Report *No. 639, April 19, 1926, Calendar 635,* which incorporates House Report *No. 228.*)

* * * *

"The Committee on Indian Affairs, to whom was referred the bill (H.R. 8185) to amend sections 1, 5, 6, 8, and 18 of an act approved *June 4, 1920,* entitled 'An act to provide for the allotment of lands of the Crow Tribe, for the distribution of tribal funds, and for other purposes,' having considered the same, report favorably thereon with the recommendation that the bill do pass with the following amendment: (not pertinent)

* * * *

The facts are fully set out in House Report No. 228, Sixty-ninth Congress, first session, which is attached hereto and made a part of this report.

There is also attached a letter from the Secretary of the Interior under date of *March 17, 1926.*

(House Report No. 228, Sixty-ninth Congress, first session)

The Committee on Indian Affairs, to whom was referred the bill (H.R. 8185) to amend sections 1, 5, 6, 8, and 18 of an act approved *June 4, 1920,* entitled 'An act to provide for the allotment of lands of the Crow Tribe, for the distribution of tribal funds, and for other purposes,' having considered the same, report thereon with a recommendation that it do pass with the following amendments: (not pertinent)

* * * *

A subcommittee and your full committee have held extensive hearings on this measure and the Department of the Interior and representatives of the Crow Tribe were allowed to present a very complete case. This bill amends the act of *June 4, 1920,* and the greater part of

the language of the present bill is the same as existing law.

The proposed amendments to existing law is contained in this bill are as follows:

Section 1. This section is amended by adding the words 'as amended' for the purpose of clarifying the language to lease their lands without restrictions. It is believed by the Indians that this action will be of great benefit to the entire tribe.

* * * *

The report of the Secretary of the Interior on this bill is attached hereto and made a part of this report.

Department of the Interior
Washington, January 30, 1926

Hon. Scott Leavitt,
Chairman Committee on Indian Affairs,
House of Representatives.

My Dear Mr. Leavitt: I have your letter of *January 23, 1926,* inclosing copy of H.R. 8185 (69th Cong., 1st sess.).

This bill contemplates amending sections 1, 5, 6, 8, and 18 of an act approved *June 4, 1920* (41st Stat. L. 751-757), affecting rights of the Crow Tribe of Indians of Montana.

The first change in section 1 of the act appears in line 5 of page 3, where the words 'as amended' have been added for the purpose of clarifying in the minds of the Indians that the trust patents issued in pursuance thereto shall have the force and legal effect as prescribed by the act known as the 'General allotment act' of *Febru-8, 1887,* as amended up to the present. The addition of these two words will not in any way affect existing law.
* * * *"

PROOF OF SERVICE

I CALE CROWLEY, one of the attorneys for nongovernmental respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on *February 26, 1975,* I served three copies of this brief on:

1. Thomas E. Towe
   Towe, Neely & Ball
   2525 Sixth Avenue North
   Billings, Montana 59101
   Attorneys for Petitioner

2. Solicitor General
   Department of Justice
   Washington, D.C. 20530

one copy of this brief on:

1. Otis Packwood
   United States Attorney
   Federal Building
   316 North 26th
   Billings, Montana 59101

2. George R. Hyde
   Glen R. Goodsel
   Attorneys, Department of Justice
   Washington, D.C. 20530

all by mailing in duly addressed envelopes with first class postage prepaid.

CALE CROWLEY
Attorney for Nongovernmental Respondents
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Billings, Montana 59103

IN THE

SUPREME COURT OF THE UNITED STATES

MAR 20 1975

MICHAEL RODAK, JR., CLERK

October Term, 1974

No. 74-961

PHOEBE WILSON DILLON, Petitioner,

-vs-

ANTLER LAND COMPANY of Wyola, a Montana Corporation; LITTLE HORN LAND COMPANY, a Montana Corporation, ANTLER LAND COMPANY, A Montana Corporation, LITTLE HORN LAND AND LIVESTOCK COMPANY, a Montana Corporation; UNION BANK AND TRUST COMPANY, Executor of the Estate of BERTHA TSCHIRGI; REX HIBBS, Executor of the Estate of F. M. TSCHIRGI; FRANCIS J. MURTHA, as Trustee for TRUSTEES OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREA PENSION FUND; and the UNITED STATES OF AMERICA,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Thomas E. Towe
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IN THE

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October Term, 1974

No. 74-961

PHOEBE WILSON DILLON, Petitioner,

-vs-

ANTLER LAND COMPANY of Wyola, a Montana Corporation; LITTLE HORN LAND COMPANY, a Montana Corporation, ANTLER LAND COMPANY, a Montana Corporation, LITTLE HORN LAND AND LIVESTOCK COMPANY, a Montana Corporation; UNION BANK AND TRUST COMPANY, Executor of the Estate of BERTHA TSCHIRGI; REX HIBBS, Executor of the Estate of F. M. TSCHIRGI; FRANCIS J. MURTHA, as Trustee for TRUSTEES OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREA PENSION FUND; and the UNITED STATES OF AMERICA,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

RESPONDENTS' ARGUMENTS IN OPPOSITION

In their Brief in Opposition to this Court's granting of Petitioner's Petition for Writ of Certiorari, the non-governmental Respondents press four points:

First:

With the issuance of a fee patent, Petitioner's land became subject to state law perforce of Section 1 of The Crow Act of 1920 and 25 U.S.C. 349 (Brief in Opposition, pp. 5; 6-9; 10-16 26).

Second:

The cases relied upon by Petitioner as establishing precedent contrary to that of the Ninth Circuit's decision do not involve the controlling facts of this case or the same granting Indian legislation (Brief in Opposition, p. 24).

Third:

Petitioner cannot collaterally attack the validity of her fee patent (Brief in Opposition, pp. 5; 9; 20; 21 & 25);

Fourth:

Mandamus does not lie against the United States to compel It, in a direct action, to set the fee patent aside (Brief in Opposition, pp. 5; 9; 20; 21 & 26).

REPLY ARGUMENT

I.

RESPONDENTS' PRINCIPAL ARGUMENT IS NON-RESPONSIVE TO THE QUESTION CURRENTLY BEFORE THE COURT AND WHOLLY IGNORES THE CRITICAL ISSUE IN THIS CASE

Respondents' first argument really goes to the merits of this case and does not address the reasons why the Writ should not be granted. Simply put, the conclusion which follows from their confusing discussion of legislative history is that Section 1 of the Crow Act of June 4, 1920 (41 Stat. 695) incorporates by reference Section 6 of the General Allotment Act of Febrary 8, 1887 (24 Stat. 388) [now 25 U.S.C. 349]; therefore, once a fee patent is issued, perforce of Section 349, the government trust is extinguished and the allottee and his land are

subject to state law.

Petitioner agrees with this observation and further asks, "So What?" The critical question wholly ignored by Respondents' Brief is whether the restriction of Section 2 of the Crow Act on the sale of Crow lands patented in fee pursuant to Section 1 commands a different result.

The thrust of Petitioner's argument why this Court should grant Certiorari is that both lower courts likewise ducked the difficult issue raised by the juxtaposition of Section 2 and 25 U.S.C. 349, as incorporated by Section 1. Their myopia lies in concluding that a fee patent having issued Petitioner for her land, Section 349 compels recognition that Montana statutes of limitations and laws of adverse possession apply to vest title in the Respondents, notwithstanding Section 2's clear declaration that such conveyance of the

land to these large non-Indian landowners is absolutely void!

As argued in the Petition for Writ of Certiorari, this conclusion is clearly contrary to Ewert v. Bluejacket, 259 U.S. 129 (1922), wherein this Court held that federal prohibitions against the alienation of Indian lands to non-Indians are supreme, so that state limitations on actions for recovery of land "cannot properly have application to give vitality to a void deed and to bar the rights of Indian wards in lands subject to statutory restrictions." 259 U.S. at 137-138. It is also contrary to the decisions of the Seventh and Tenth Circuits which have held that state statutes of limitations cannot apply to bar actions brought to recover restricted fee land, the necessary implication being that federal trust responsibilities have not been fully extinguished. United States v. Schwarz, 460 F. 2d

1365 (7th Cir. 1972); Garcia v. United States, 43 F. 2d 873 (10th Cir. 1930). As is readily apparent, the decision of the Ninth Circuit is anomolous so as to warrant invoking the supervisory jurisdiction of this Court.

II.

RESPONDENTS HAVE SIMPLY MISREAD THE CASES RELIED UPON BY PETITIONER

Respondents' second swat at the first argument raised in the Petition for Certiorari is that the cases cited do not rest upon facts or legal conditions analogous to those at bar. They contend first, that the cases involve tribes "expressly excepted from the provisions of 25 U.S.C. 349 -- Cherokees, Creeks; Choctaws; Chickasaws; Seminoles; Osage; Miamies; Peorias; Sacs and Foxes; Seneca Nation plus the Five Civilized Tribes in

Oklahoma...." Brief in Opposition, p. 24. The "Five Civilized Tribes" are the first five bands of Indians referred to.

Contrary to Respondents' assertions, none of the cases cited wherein state statutes of limitation were refused application involved tribes exempt from Section 349: Ewert v. Bluejacket, supra, p. 4, dealt with a Quapaw; United States v. Schwarz, supra, p. 4-5, involved a Chippewa; and, Garcia v. United States, supra, p. 5 concerned lands sold by a member of the Pueblo Tribe.

They further contend that each case "involves the legal validity of conveyances by noncompetent Indians before a patent in fee issued, and while legal title still vested in the United States in trust for noncompetent Indian Allottee." Brief in Opposition, p. 24. To the contrary, in both Schwarz and Garcia the lands sought to be recovered from the

non-Indian grantee had been held by the Indian by patent-in-fee. The lands in Ewert, while not held by fee patent, had passed to the non-Indian grantee pursuant to a statute providing for conveyance of inherited lands "free from restrictions" when approved by the Secretary of Interior, the legal effect being "the same as if a final patent without restriction upon the alientation had been issued to the allottee." Act of May 27, 1902, c. 888 (32 Stat. 275) [now, 25 U.S.C. 379]. 25 U.S.C. 347 further directs that state statutes of limitation are applicable to actions brought to recover lands so approved.

In all cases cited, therefore, just as in the case at bar, legal title apparently passed to the non-Indian grantee thereby subjecting any action brought to recover the land to state statutes of limitation. Ewert

determined, however, that where a conveyance of Indian land to a non-Indian grantee is absolutely prohibited by federal statute, state laws limiting the time within which the grantor or his heirs can bring an action to recover the land have no application, because the effect would be to perfect a conveyance absolutely void under an Act of Congress.

Schwarz and Garcia, while reaching the same result, proceed upon a different theory. They hold that notwithstanding issuance of a fee patent, a statutory condition subsequent restricting alienation of the fee carries with it the necessary implication that the lands are still restricted lands over which federal trust responsibilities have not been fully extinguished. Consequently, the courts in both cases found that adverse possession under a state statute of limitations

could not run to perfect a conveyance of land not so alienable by the Indian.

Section 2's prohibition against alienation of Petitioner's land to the Respondent non-Indian landowners places this case, both factually and legally, on all fours with Ewert, Schwarz, and Garcia. The decisions relied upon by Respondents, Dickson v. Luck Land Co., 242 U.S. 371 (1917), United States v. Waller, 243 U.S. 452 (1917) and Larkin v. Paugh, 276 U.S. 431 (1928), all concern the applicability of state law under 25 U.S.C. 349 where the fee patent is not otherwise restricted, and, therefore, have no applicability to the controlling facts of this case. The only other case relied upon by Respondents, United States v. Powers, 305 U.S. 527 (1939), apart from involving lands on the Crow Reservation and some of the same Respondents as are named in

this suit, is totally irrelevant. That case concerned neither the applicability of state law to Crow fee lands nor construction of 25 U.S.C. 349, Section 1 or Section 2 of the Crow Allotment Act.

This Court should, therefore, grant Certiorari because Section 2 of the Crow Act has never before been construed by this Court, and because the decision of the Ninth Circuit is not consistent with applicable decisions of the Court and other Circuits.

III.

A FEE PATENT PROCURED THROUGH FRAUD PRACTICED BY THE WHITE MAN IS COLLATERALLY ASSAILABLE BY THE INDIAN PATENTEE

Here, again, Respondents neglect to meet head-on the reasons for granting the Writ presented in Argument II of the Petition for Writ of Certiorari. Instead, they have

slipped-off to a side issue arguing that Petitioner cannot collaterally attack the validity of the fee patent which was issued her.

It is generally posited that a patent issued an individual on public lands is unassailable, except by the United States in a direct action to cancel the instrument. With the exception of Moore v. Robbins, 96 U.S. (6 Otto) 848 (1878), the cases cited on page 20 of Respondents' brief generally support this proposition.

However, whereas here, a patent's validity is assailed on the basis of fraud practiced in securing its procurement, this Court has repeatedly recognized an exception to the general rule and upheld the maintainability of a collateral attack. The doctrine that a court of equity will entertain actions between

private individuals to set aside patents for fraud or mistake was fully reviewed and announced in Johnson v. Towsley, 80 U.S. (13 Wall.) 485 (1871). Since, the doctrine has been restated and reaffirmed in Shepley v. Cowan, 91 U.S. (23 Wall.) 424 (1875) and Moore v. Robbins, supra, dealing with public lands generally, and Ross v. Stewart, 227 U.S. 530 (1912), concerning patents issued on Indian lands, in particular.

Notwithstanding repeated assertions by the Respondents that the patent received by Petitioner is valid (Brief in Opposition, pp. 5, 6, 10, 20) both lower courts held there to be a trible issue as to whether its issuance was procured through fraud. They further held, however, that applicable state statutes of limitation bar any right to relief. As contended in the Petition for

Writ of Certiorari, the decision of the Ninth Circuit is in conflict with that of the Eighth and not consistent with a prior District Court decision in Montana.

IV.

THE ISSUE OF WHETHER OR NOT MANDAMUS LIES AGAINST THE UNITED STATES TO COMPEL IT TO SET A FEE PATENT ASIDE IS TOTALLY IRRELEVANT TO THE ISSUES FRAMED BY THE PLEADINGS

The Complaint does not state a claim for relief in the nature of mandamus. (Record, pp. 1 - 13).

What Petitioner seeks against the United States is an adjudication that It is liable in damages pursuant to the Federal Tort Claims Act for failure to take action on Petitioner's behalf to set aside the deed given Antler Land Company. (Record, pp. 6-8).

Both lower courts found the duty of the United States, if any, to be discretionary and not mandatory and, therefore, concluded that the Federal Tort Claims Act does not apply. (Record at 574); (Opinion of United States Court of Appeals for the Ninth Circuit, Appendix A to the Petition for Writ of Certiorari, pp. 11a-12a.) The propriety of this decision is the question brought before this Court in Argument III of the Petition for Writ of Certiorari.

A subsidiary issue attending this third question, is whether the lower court committed fatal error when it granted summary judgment in favor of the United States on Petitioner's Second Calaim for relief sua sponte without a motion, without notice to Petitoner, and without a reasonable opportunity to present material pertinent thereto as required by Rule 12(b).

(See Appendix D, p. 2d to the Petition for Writ of Certiorari). While the fourth defense of the Answer of the United States to the Complaint states as a defense that, "the Complaint fails to state a claim upon which relief can be granted against the United States", this defense was never placed in the form of a motion to dismiss. Consequently, the lower court's granting of summary judgment on Count Two of the Complaint took Petitioner by surprise when the matter was ruled upon without notice, without an opportunity to submit affidavits or other matters in support of the claim and without an opportunity to brief the subject or present oral argument at the hearing.

The rule that parties must be given adequate notice and an opportunity to present all material facts when a Rule 12(b) motion

is converted into one for summary judgment is so well established in the Ninth Circuit, itself, as to warrant summary reversal of the appellate court's opinion on this issue, alone, See, Erlich v. Glasner, 374 F. 2d 681 (9th Cir. 1967); Costen v. Pauline's Sports Wear, 391 F. 2d 81 (9th Cir. 1968).

CONCLUSION

As a familiar rule, legislation affecting Indians is to be construed in their interest. As a consequence, perhaps, where Congress has itself legislated restrictions on the sale and disposition of Indian fee lands, courts have refused application of state statutes of limitation and laws of adverse possession where the effect would be to perfect conveyances prohibited by federal law. Similarly, where rights have been

acquired in Indian lands by an unlawful or fraudulent act, the courts have been loathe to estop the Indian grantor or his heirs from maintaining an action for their recovery.

Title to thousands of acres of Crow fee lands deeded over the years to large non-Indian landowners in spite of the clear prohibition of Section 2 of the Crow Allotment Act of June 4, 1920, depends on the ultimate disposition of this case. The prayed for Writ should, accordingly, be granted to review the consistency of the Ninth Circuit's opinion with the above principles announced by this Court and other circuits and to decide, with finality, the important question of Federal Indian Law raised by Section 2 of the

Act of June 4, 1920, never heretofore construed by this Court.

Respectfully submitted,

THOMAS E. TOWE
Towe, Neely & Ball
2525 Sixth Avenue North
Billings, Montana 59101
Attorney for Petitioner

By, WILLIAM L. MADDEN, JR.
Member of the Firm
(On the Petitioner's Reply Brief in Support of Petition For a Writ of Certiorari)

DATED this_____day of March, 1975.

AFFIDAVIT OF PROOF OF SERVICE

STATE OF MONTANA)
County of Yellowstone) ss.

I, WILLIAM L. MADDEN, JR., an attorney duly authorized to practice law in the state of Montana and the Courts of the United States of America, and member of the firm of Towe, Neely & Ball, 2525 Sixth Avenue North, Billings, Montana, attorneys of record for PHOEBE WILSON DILLON, Petitioner herein, depose and say that on the _____ day of March, 1975, I served a copy of the foregoing REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit on the several parties thereto, as follows:

1. On the United States, by mailing copies in duly addressed envelopes, First Class, postage prepaid, to:

Mr. Otis L. Packwood
United States Attorney
District of Montana
Federal Building
Billings, Montana 59101

2. On the United States, by mailing copies in a duly addressed envelope, with Air Mail postage prepaid, to:

THE SOLICITOR GENERAL
DEPARTMENT OF JUSTICE
Washington, D. C. 20530

Mr. Kent Frizzel
Assistant Attorney General
Department of Justice
Washington, D. C. 20530

Messrs. George R. Hyde and
Glen R. Goodsell, Attorneys
Department of Justice
Washington, D. C. 20530

3. On the non-government Respondents herein, by mailing copies in a duly addressed envelope with First Class postage prepaid, to their respective attorneys of record at their following addresses:

Rex F. Hibbs
Hibbs, Sweeney & Colberg
Mutual Benefit Life Building
Billings, Montana 59101; and

Cale Crowley
Crowley, Kilbourne, Haughey,
Hanson & Gallagher
500 Electric Building
P. O. Box 2529
Billings, Montana 59103.

WILLIAM L. MADDEN, JR.

SUBSCRIBED AND SWORN TO before me this

_____day of March, 1975.

_____
Notary Public for the State of Montana
(SEAL) Residing at Billings, Montana
My Commission Expires 1/6/78

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-961

PHOEBE WILSON DILLON, PETITIONER

v.

ANTLER LAND COMPANY OF WYOLA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 1a-15a) is reported at 507 F.2d 940. The opinion of the district court (Pet. App. B, 1b-25b; Pet. App. C, 1c-2c) is reported at 341 F. Supp. 734.

JURISDICTION

The judgment of the court of appeals was entered November 6, 1974. The petition for a writ of certiorari was filed on February 3, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner, a Crow Indian, may sue the United States under the Federal Tort Claims Act on the ground that the United States failed to bring suit to set aside her fee patent, which the Secretary of Interior had

issued to her in 1955 in reliance on a false representation by her, or on the ground that the United States failed to sue a subsequent purchaser of the land to set aside the sale as a violation of Section 2 of the Crow Allotment Act of 1920.[1]

STATUTES INVOLVED

The relevant portions of the Act of June 4, 1920 (41 Stat. 751) and of 25 U.S.C. 185, 25 U.S.C. 348, and 25 U.S.C. 349 are set forth at Pet. App. D.

STATEMENT

The case was decided on summary judgment and the facts stated are those assumed to be true by the courts below on the basis of affidavits and admissions (see Pet. App. B, 3b, 22b n.4).

In 1923 and 1924, petitioner, a Crow Indian, received trust allotments totalling 1,040 acres on the Crow Reservation in Montana. Petitioner, and before her the Bureau of Indian Affairs and her father, had leased the land to Matt Tschirgi and later his company, Antler Land Company of Wyola.[2] The leases were such that Tschirgi paid petitioner 5 years' rental in advance and then renewed the leases for an additional year annually (Pet. App. A, 3a; Pet. App. B, 3b-4b).

In 1949, upon her application, petitioner was placed on a list of competent Crow Indians pursuant to the Crow Allotment Act of 1920 (Act of June 4, 1920, 41 Stat. 751), which had the effect of conferring upon her competency status to manage her own affairs (Pet. App.

---

[1]The other issues raised by petitioner (Pet. 2-3, 8-16) concern the liability of the non-federal respondents (see n. 8, *infra*).

[2]The district court found Tschirgi to be "the alter ego of Antler Land," and treated his acts as the acts of Antler (Pet. App. B, 23b, n. 6).

A, 3a). According to petitioner's affidavit filed in the district court, Tschirgi[3] asked her in February 1955 to apply for a patent in fee covering the 1,040 acres.[4] Petitioner thereupon filed such an application with the Secretary of Interior, stating that she desired to sell the land and use the proceeds to purchase other land closer to the sheep ranch owned by her and her husband (R. 123). Petitioner falsely stated on her application that she had not been asked to procure a patent in fee (Pet. App. B, 5b-6b).

Petitioner also stated on her application that she had not made an agreement to sell her land (*id.* at 6b). On May 21, 1955, however, while her application was pending, petitioner entered into a written contract to sell the land to Antler Land Company for $7,280 (*id.* at 4b). Petitioner did not notify the Secretary of this contract (*id.* at 6b).[5]

After an investigation, the Secretary approved petitioner's application and on October 3, 1955, a fee patent was delivered to her. On October 6, 1955, she executed and delivered a warranty deed to Antler, receiving $3,711 in cash, the remainder of the $7,280 being deducted for past advances (Pet. App. B, 4b-6b). At the date of the conveyance, Antler owned more than 1,920 acres of grazing land within the Crow Reservation. (All of Antler's successors in interest except respondent Francis Murtha also owned more than 1,920 acres at the time they acquired their interests.) (Pet. App. A, 5a.)

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[3]Tschirgi had died by the time this suit was instituted in 1970 (Pet. App. A, 5a).

[4]Petitioner stated in her affidavit that she needed money at this time and that Tschirgi refused to loan her any except on condition that she apply for a fee patent (Pet. App. B, 4b).

[5]Under the General Allotment Act, 25 U.S.C. 348, the contract would have been considered "null and void" (Pet. App. B, 7b-8b).

On July 20, 1970, nearly fifteen years after the patent and conveyance, petitioner brought this suit in the United States District Court. She sought to set aside the patent in fee and the subsequent conveyance and to obtain damages from the United States for failure to bring suit on her behalf. In support of her first claim, petitioner alleged:

> (1) that she was fraudulently induced by Antler to obtain the patent and sell the land to it at less than its true value;
>
> (2) that while the land was still in trust she was induced by Antler to execute a contract to convey the land to it in contravention of 25 U.S.C. 348;
>
> (3) Antler was absolutely prohibited by statute from purchasing the land because it already owned lands within the Crow Indian Reservation beyond the extent permitted by Section 2 of the Crow Allotment Act, *supra* (Pet. App. A, 3a-6a; Pet. App. B, 2b).

In her second claim she sought damages of $33,000 against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), for violation of its alleged duty to protect her land in accordance with 25 U.S.C. 185 (Pet. App. A, 6a; Pet. App. B, 2b).

The court concluded that in regard to "fraud as it relates to the validity of the deed—there may be a genuine issue of material fact and it cannot be held that the defendants are entitled to a judgment on that issue as a matter of law" (Pet. App. B, 7b). The court held the purchase agreement to have been void and held that if it is shown that it was "a factor inducing the execution of the deed, the deed was voidable" (*id.* at 7b-8b). The court further held that the "deed conveying the land to Antler Land was accepted by Antler Land in violation of Section 2

of the Crow Act and was void" (*id.* at 8b). The court concluded, however, that petitioner's actions to set aside the deed (and presumably to set aside the patent) "are all barred by the Montana Statutes of Limitations" (*id.* at 11b-12b) and adverse possession (*id.* at 16b), and rendered summary judgment for the defendants.The court also held that if the United States had any duty to bring suit to recover the land, that duty was discretionary and not actionable under the Federal Tort Claims Act (*id.* at 17b).

The court of appeals affirmed on essentially the same grounds except that in light of its decision on the statute of limitations it withheld decision on the applicability of Section 2 of the Crow Act (Pet. App. A, 3a-15a).

ARGUMENT

Petitioner argues that 25 U.S.C. 185 imposed a mandatory duty on the United States to litigate this case on her behalf (Pet. 16). That statute by its terms applies to Indian allotments where no patent in fee has been issued. It imposes no mandatory duty on the United States to litigate to set aside a fraudulent patent or a conveyance contrary to law. Even in regard to restricted land, the decision whether to litigate on behalf of an individual Indian is left to the discretion of the government. Thus although 25 U.S.C. 175, a companion statute, states that the "United States attorney shall represent [allotted Indians] in all suits at law and in equity," such representation is discretionary, not mandatory. *Siniscal* v. *United States*, 208 F.2d 406 (C.A. 9), certiorari denied, 348 U.S.

818. Similarly in *Heckman* v. *United States*, 224 U.S. 413, 446, this Court stated:

> In what cases the United States will undertake to represent Indian owners of restricted lands in suits of this sort is left under the acts of Congress to the discretion of the Executive Department.[6]

Petitioner's claim against the United States is brought under the Federal Tort Claims Act, 28 U.S.C. 1346(b). That Act specifically provides (28 U.S.C. 2680(a)) that it does not apply to:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a *discretionary function or duty* on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. [Emphasis added.]

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[6]See also *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, holding that individual Indians are empowered to commence suit to protect their trust lands and recognizing that it is left to the discretion of the United States whether to sue on behalf of Indian owners of restricted land.

The language in *United States* v. *Beebe*, 127 U.S. 338, relied upon by petitioner to find an absolute duty on the government to sue on her behalf (Pet. 17), is both hypothetical and dictum. Moreover, that dictum is inconsistent with the later expressions by the Court discussed above. And in any event, the Court in *Beebe* addressed only those situations "which personal litigation could not remedy" (127 U.S. at 342), such as the wrongful issuance to one Indian of a patent for land that would otherwise have been issued to another Indian.

Nor does *United States* v. *Debell*, 227 Fed. 775 (C.A. 8) (Pet. 18), impose such a duty. There the United States, exercising its discretion to do so, prosecuted an action on behalf of an Indian who wrongfully obtained a fee patent.

The Act thus provides no cause of action under the facts of this case.[7] The decision below dismissing the claim against the United States is correct.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied with respect to the third question presented in the petition (at p. 3).[8]

Respectfully submitted.

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MAY 1975.

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[7]The United States also argued that the two-year period of limitations under the Federal Tort Claims Act (in effect in 1955, when the United States issued the fee patent to petitioner, Act of April 25, 1949, 63 Stat. 62, 28 U.S.C. (1958 ed.) 2401(b)) barred her suit. The courts below did not reach this issue.

[8]While the United States has not taken a position in this litigation in regard to the two other issues raised by petitioner (Pet. 2-3, 8-16), which concern her suit against the private respondents, we discuss them briefly since the administration of federal statutes may be affected. Petitioner properly points out that in applying the state statute of limitations to bar her suit, the courts below failed to discuss *Ewert* v. *Bluejacket*, 259 U.S. 129, which held that neither a state statute of limitations nor the doctrine of laches barred a suit by an Indian patentee to recover from a non-Indian land that had been sold, with the approval of the Secretary of Interior, in violation of a federal statutory restric-

tion. But see 25 U.S.C. 347 (state statutes of limitations apply to suits by Indian patentees to recover possession of land sold with the approval of the Secretary).

Ewert involved a sale of land with respect to which a trust patent, not a patent in fee, had been issued. See *Bluejacket* v. *Ewert*, 265 Fed. 823, 825 (C.A. 8). We bring to the Court's attention the recent decision in *Capitan Grande Band of Mission Indians* v. *Helix Irrigation District*, No. 73-2956 (C.A. 9) (March 14, 1975), holding that, in regard to a trespass on *trust* land, state statutes of limitations do not apply in suits by Indians and stating (slip op. 4 n.6):

> Our recent decision in Dillon v. Antler Land Co., 507 F.2d 940 (9th Cir. 1974), *aff'g.* 341 F. Supp. 734 (D. Mont. 1972), is distinguishable in that it involved the application of the Montana statutes of limitations to land owned by an Indian in fee simple, which had lost its character as a trust property interest entitled to federal protection.

We should also note that the court of appeals did not decide whether, if petitioner's suit had been considered timely, her sale in 1955 to Antler constituted a violation of Section 2 of the Crow Allotment Act (Pet. App. D, 1d) because Antler at that time owned more than 1,920 acres of grazing land on the reservation. See Pet. App. A, 14a. The district court believed that Section 2 restricted sales by a competent Indian of land patented in fee despite the fact that in such circumstances 25 U.S.C. 349 provides that all restrictions on sale are removed (Pet. App. B, 9b-11b). The district court thought it could not resolve the apparent conflict between Section 2 and 25 U.S.C. 349 by interpreting Section 2 to apply only to trust lands since Section 2 expressly refers to patents in fee. However, it is *possible* to read Section 2 to apply only to trust land or patents in fee held by Indians not judged competent, in which cases the Secretary would have to authorize or approve any sale, as Section 2 appears to contemplate. Read in that way, Section 2 does not conflict with 25 U.S.C. 349.